Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

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In The

Supreme Court of the United States

October Term, 1975

No. 75-270

THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

and

NELLIE MAE WEBB, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CIV. 73-0-320

UNITED STATES OF AMERICA,
Plaintiff,
vs.
THE SCHOOL DISTRICT OF OMAHA, STATE OF NEBRASKA, et al.,
Defendants.

MEMORANDUM OPINION

(Filed October 26, 1973)

This matter is before the Court on the motion of plaintiff for a preliminary injunction pursuant to Rule 65, Federal Rules of Civil Procedure. A full evidentiary hearing was held on this motion with all parties given ample opportunity to present their positions to this Court, the hearing having been completed on August 30, 1973.

The present prayer for injunctive relief stems from a complaint filed in this Court by the United States Department of Justice on August 10, 1973, alleging a cause under Title IV of the Civil Rights Act of 1964, 42 U. S. C. § 2000e-6 (a) and (b), and the Fourteenth Amendment to the Constitution of the United States. The complaint alleges that the named defendants have engaged in racial discrimination in the operation of the Omaha Public School System, located in Douglas and Sarpy Counties, Nebraska, and prays for broad equitable relief enjoining defendants from discriminating on the basis of race or color in the operation of the Omaha Public School System and requiring the school system to adopt and implement a plan to eliminate the alleged discriminatory practices so as to establish a unitary public school system in Omaha in compliance with the Fourteenth Amendment to the Constitution of the United States. This Court has jurisdiction over the subject matter of this action under 28 U. S. C. § 1345 and 42 U. S. C. § 2000e-6(a) and (b).

The present motion for a preliminary injunction prays that this Court prohibit the opening of Martin Luther

King Middle School (located in the Omaha School District) on September 4, 1973, as anything other than an integrated school, and further prays that the transfer policy presently in effect in the Omaha Public School System be enjoined from operating pending a full trial on the merits of this matter.

FINDINGS OF FACT

The defendant School District of Omaha (district) has within its boundaries the City of Omaha and part of Sarpy County, Nebraska. Millard and Ralston public schools and District 66 are excluded. The school district operates 73 elementary schools, 12 junior high schools, and 8 senior high schools within its boundaries. For the 1972-73 school year, 63,125 students were enrolled in the district. Of these 49,383 were white; 12,220 were black; and 1,521 Spanish surnamed American, American Indian and Oriental. The percentage of black students was 19.4 per cent.

As to the racial composition broken down into the various school levels, the high schools were 17.48 per cent black; the junior highs were 16.51 per cent black in 1972-73; and the elementary schools were 2.12 (sic) per cent black in 1972-73. The black population in the City of Omaha and the number of black school-age children has increased noticeably since 1950. The Negro population in 1940 was 5.4 per cent; in 1950, 6 per cent and in 1968, 8.3 per cent, of the total population in Omaha. Between 1950 and 1960 the number of school-age black children increased 110 per cent. In 1950, 52 per cent of the black people lived in three census tracts in the eastern portion of Omaha which were bounded by 24th Street to 30th Street as the east and west boundaries and Cuming Street and Bedford Street as the north-south boundaries. In 1960 these same three tracts held less than 30 per cent of the total black population and the neighboring census tracts 7, 8, 9, 12 and 13A, all were more than 50 per cent Negro, and tracts 14 and 52 had 46 to 37 per cent black population respectively. Reference to the census tracts on page 36 of defendants' Exhibit 51 shows that the movement between 1950 and 1960 was north and somewhat west of what it had been in 1950.

SEGREGATION

As to the senior high schools, Omaha Technical High School, located in the approximate center of the school district, and towards the eastern portion thereof, enrolled a student body of 94.68 per cent black during 1972-73. North High, located north of the Technical attendance boundaries, was 31.13 per cent black in 1972-73 and Central High, immediately east of Tech High, had 30.36 per cent black in the school year. Three of the high schools (Bryan, located in the southeastern portion of the school district, Burke High, located in the west central portion of the school district, and Northwest, located in that general area of the school district) all enrolled less than 10 black students during the 1972-73 school year which amounted to less than 1 per cent of their student enrollment.

As to the junior high schools, Horace Mann Junior High, whose attendance boundaries are generally speaking within the area of Omaha Technical High School, enrolled 97.95 per cent black students in 1972-73. Monroe Junior High, located to the east of Mann and to the immediate northwest of Tech High School attendance boundaries, enrolled 40.99 per cent black students in 1972-73. Four of the junior high schools, Bancroft, Beveridge, Bryan and Marrs, enrolled ten or less black students in 1972-73, which were less than 2 per cent of their student enrollments. Bancroft and Marrs attendance boundaries are in the southern portion of the district in relation to Mann and Monroe and somewhat east therein in certain portions. Bryan is in the southernmost portion of the district and its area is the same as that of Bryan high school. Beveridge Junior High is located in the western part of the school district and its boundaries correspond with the southern portion of Burke High School.

Of the elementary schools, eleven of the seventy-three were over 75 per cent black and 3 of those eleven were over 90 per cent black. Thirty of the elementary schools had less than one per cent and of those thirty, twelve had no black students enrolled during the 1972-73 school year. The elementary schools with the greater precentage of black students were all located in east central and northeast portion of the Omaha School District and the City of Omaha. Those elementary schools that had the least percentage of black students in 1972-73 were located primarily in the western and southern parts of the District in the City of Omaha.

ASSIGNMENT OF BLACK FACULTY

(a) Elementary schools

In the school year 1962-63, there were 55 black elementary teachers assigned to majority black elementary schools.[1] There were only 56 black elementary faculty members in the district. Clifton Hill, which along with Franklin, is an elementary school in an attendance zone which will feed into the Martin Luther King Middle School (King), turned majority black between 1966-67 and 1967-68. The first black faculty was assigned to that school in 1968-69. Franklin turned majority black in 1966-67 and its first black faculty member was assigned in 1965-66 when Franklin was 44 per cent black.

(b) Junior high schools

In 1964-65 there were 21 black faculty members at the junior high level. Nineteen were assigned to Horace Mann Junior High, which was 97 per cent black, and the other two were assigned to Tech Junior High which was 61 per cent black. In 1967-68, there were 32 black teachers in the junior high schools, 25 of which were assigned to Horace Mann (98 per cent black), 5 to Tech Junior High (89 per cent black), and 2 to Monroe Junior High (80 per cent black). In the 1971-72 school year there were 56 total black faculty members at the junior high school level, 27 of which went to Mann (98 per cent black), and 18 of which were assigned to Tech Junior High (91 per cent black).

(c) High schools

The first black faculty at the high school level was assigned in 1963-64. During that year Technical High School turned majority black and 2 black faculty members out of the total of 3 were assigned to that high school. In 1963-64, the other faculty member was assigned to North High (9 per cent black). Central High (13 per cent black) had no black faculty members.

In 1972-73, 44 of the 49 black faculty members in the high school level were assigned to Tech (95 per cent black), Central (30 per cent black) and North (31 per cent black).

It would thus appear that there has been in the district an assignment of black faculty to those schools which have the greater amounts and/or majority of black students in their student bodies. (See also Government Exhibit No. 1.)

BUILDING SITES AND FEEDER ZONES

(a) Site location

The planning for the new Martin Luther King Middle School (King), which is to open in the present school year 1973-74, was started by the school board some six years ago and the final decision to construct King was made approximately two years ago. King is located within the boundaries of the Clifton Hill elementary zone.[2]

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[1] Reference in these findings to a "majority black" school indicates one with a black enrollment of over 50 per cent. The government's reference to "predominantly black" schools during the hearing was expressed to the Court to indicate those with 65 per cent or more black enrollment. References herein also indicate that percentage.

[2] At the time the bond issue was voted on to finance the building of King, another middle school was planned which was generally referred to as the Central Park Belevedere Middle School. The bond issue was defeated in the spring of 1970 and as a result of that, Central Park was never actually built although the school district and Board of Education of Omaha Public Schools encouraged that it be built. See plaintiff's Exhibit 34.

The stated purpose of the King middle school (a relatively new idea in the district encompassing the fifth, sixth and seventh grades) was to relieve overcrowding at Clifton Hill Elementary and Franklin Elementary schools and to do away with the use of portables and cottages at those schools.[3]

Prior to the construction of King, there is evidence that some opposition to its location was communicated to the Omaha School Board. Mr. Damian D. Lacroix, a member of the Board of Education during 1969-70, testified that he had some reservations as to its construction because King was located in such a manner that the eastern boundary of the school is a railroad track and that it would be predominantly black. Mr. Lacroix submitted a resolution in February, 1970, which is marked as Exhibit 32, which *inter alia* analyzed the segregation patterns in the School District and suggested that some desegregative action be taken. In August, 1970, the district responded to this resolution (defendants' Ex. 12) and this response indicated its attitude that some revision was necessary and that such revision in the form of assignment of Negro faculty throughout the district was contemplated and would be done as soon as possible without depleting the existing staff and would be implemented with the employment of new personnel. It also points out that the number of schools with some Negro enrollment increased from 41 in 1964 to 75 in 1970 and defendants' Exhibit 4 substantiates this and extends it to show that in 1972 there were 95 schools with some minority (not necessarily black) enrollment. Thus, there was an increase in the number of minority children that were attending school and in fact from 1962-72, the percentage of minority students attending majority white schools increased 20 per cent and the per cent of minority students who had attended schools with 80 per cent minority enrollment decreased from 66 to 46 per cent.

Opposition to the building of King at its present location was also voiced by Mr. Tim J. Rouse who has been a school board member since 1971. He pointed out that prior to his election, and afterwards, he expressed concern over King and its segregative potential. In addition, he opposed it because of its physical location and its lack of through streets and access roads. He preferred that it be built further west so that the attendance boundaries would produce a more evenly dispersed racial balance. At no time did any of the members of the Board express to him that the reason for building King at its present location was to defeat integration. The primary and stated purpose as conveyed to him was to eliminate overcrowding at Clifton Hill and Franklin.

Also opposition was voiced by an Angeline C. Wead who has lived in the Franklin school zone since December, 1963. Ms. Wead was president of the Franklin School P. T. A. in 1968 and in that capacity had some discussions relative to the proposed Martin Luther King Middle School with the Omaha Public School System. She indicated that her position, which was relayed to the School Board at a meeting in 1968, was that although there was considerable overcrowding at Franklin, overcrowding would be preferable to a new building because, with the residential patterns in the state of flux, by the time it (King) was built, blacks would have moved into that area and it would be 90 to 95 per cent black. She suggested the concept of an educational park with the school being moved further west with its eastern boundary on 45th Street.

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[3] "Portables" are temporary movable classroom structures that are moved to and from schools to accommodate increased student enrollment. They generally consist of one classroom per portable unit.

"Cottages" are homes in the neighborhood nearby the school proper which have been renovated and converted to classroom facilities.

Doctor Joe E. Hanna, who has been associate superintendent of the district since the fall of 1969, testified that during the spring of 1968 he was called upon to discuss the new concept of the middle school with citizen groups and at that time met with the Northwest Community Counsel and with parents of the Franklin elementary school and residents within that zone. The groups' response at that time was a strong endorsement of the middle school concept. At a subsequent meeting at which Doctor Hanna took part, in 1968, the middle school concept was again explained and Hanna testified that the members of the community present at that meeting exhibited disenchantment with the existing facilities at Franklin and they were concerned with the improvised classrooms and the ill-repair of the building. He testified that he did not recall anyone objecting to the school (King) for the reason that it would not accomplish integration.

(b) Feeder zones

Clifton Hill and Franklin Elementary Schools are the two designated "feeder schools" whose elementary students reaching fifth, sixth and seventh grade levels will attend King. Clifton Hill is 89 per cent black and Franklin is 75.6 per cent black and the estimated enrollment at King is to be in excess of 65 per cent black. Clifton Hill turned majority black in 1966-67 and Franklin turned majority black in 1967-68.

Junior high school students from Clifton Hill have traditionally been assigned to Monroe Junior High School which is a majority white school with 41 per cent black students in 1972-73 and 25 per cent black students in 1971-72. It was assigned as a feeder zone to Monroe Junior High at a time when both Monroe and Clifton Hill were 100 per cent white. In 1972-73, there were a number of portable classroom units and cottages at Clifton Hill and Franklin.

Evidence was offered to show that some points in those majority white attendance zones surrounding Clifton Hill and Franklin zones are closer in distance to King than some points in Clifton Hill and Franklin. The goverment's position is that the School System designated Franklin and Clifton Hill, which are majority black, as feeder zones to King when it would have been more in line with the neighborhood school concept to feed students into that school who were closer to King and that failure to do so indicates a desire on its part to allow the whites in those majority white schools to stay out of black schools even though it requires further traveling distances for all concerned. Thus, it argues, a segregative intent should be inferred. The evidence supports the view that apparently some white students live closer to King than do blacks, yet those whites are allowed to go to a predominantly white school while requiring blacks who live farther from King, to attend that institution.

Plaintiff's Exhibits 18 through 25 and defendants' Exhibits 17 and 45 all deal with the distances and routes used by the people relative to this showing. Plaintiff's Exhibit 20 would seem to show that there are points in the Harrison, Rosehill and Fontenelle attendance zones that are as close or closer to King than are certain portions of the attendance boundaries in the Clifton Hill and Franklin areas. Harrison was 1.2 per cent black in 1972-73; Rosehill was 9.6 per cent black; and Fontenelle was 17.7 per cent black. Exhibit 20 also shows that certain points in Saunders, Walnut Hill, and Yates elementary attendance zones are closer to King or as close as were certain points in the Franklin and Clifton Hill areas. Saunders was 1.6 per cent black, Yates was 14.5 per cent black, and Walnut Hill was 8.7 per cent black in 1972-73. Plaintiff's Exhibit 17A indicates that some of these attendance zones are not adjacent to the Clifton Hill zone in which King is located, although all of those, including others not specifically mentioned in these findings, are in the general area surrounding King. By reference to the testimony of Ms. Aleksa, research analyst for the Department of Justice, and the direct examination of Mr. Joseph E. Chase, coordinator of

Public Information Services for the district, it is seen that there is a discrepancy between the measurements taken by the government and those taken by the school district. This is also indicated by reference to defendants' Exhibits 45 and 17. However, notwithstanding the discrepancy, the Court notes that by general reference to plaintiff's Exhibit 17A, or any of the other exhibits that fairly and accurately represent the various elementary attendance zones surrounding the Clifton Hill zone in which King is located, it can be ascertained that there are some of these zones which have areas closer in distance to King than some areas in the Clifton Hill and Franklin zones. If the district had designated, for example, Harrison or Walnut Hill, rather than Franklin, as the feeder zone for King, there may have been a result of a more integrated King. However, if that had been done, students in the southwest corner of Harrison and the southwest corner of Walnut Hill would also have been a great distance from King and perhaps farther than the furthest distance between King and Clifton Hill or Franklin. Thus, a designation of one of those preexisting zones would have also been inconsistent with the neighborhood school concept. On the other hand, a redrawing of the attendance zone boundaries before designating the feeder zones could have eliminated the distance question and would have been more consistent with the neighborhood school concept by shortening the distance to be traveled by all concerned, black or white.

In conclusion, it would appear that King will relieve overcrowding at Franklin and Clifton Hill, but it may become a predominantly black school. There is some evidence that the district was aware of opposition from the black community as to its location, and with the distance factors taken into consideration, there may well be a question presented with reference to validity of the neighborhood school concept and policy as advanced by the district.

USE OF PORTABLES

The government contends that the use of portables and cottages in the Franklin and Clifton Hill zones, the failure to transport grades from those areas into outlying white majority zones, and the failure to adjust boundaries between the elementary attendance zones in order to gain a more balanced racial percentage, indicate segregative intent on the part of the district. As alluded to, portables were utilized by the school district at Franklin and Clifton Hill elementary schools over the preceding years. In addition, cottages were also utilized at Clifton Hill. Although portable classroom units are utilized throughout the school district, in recent years the number of portables at Franklin and Clifton Hill surpasses those placed in other schools in the district.

As far back as 1962, the Omaha Board of Education realized that a slow growth in membership was predicted in the Franklin elementary school, and recommended that the building be maintained at its capacity through boundary adjustments with neighboring schools. The adjustment of attendance boundaries is only one of many ways to deal with increased student enrollment and may not be used as frequently as other methods in the district, but the district did utilize transportation of grades, boundary adjustments, and elimination of transfers in certain schools throughout its history to accommodate increased enrollments. (See government Ex. 14). No such boundary adjustments were made at the Franklin School as recommended, but rather, in 1964, an addition was made to that school in the form of a multiple room structure and a lunch facility. In 1962 through 1964, Franklin was not yet a majority black school and did not become such until 1967-68, turning predominantly black in the following years and remaining so in school year 1972-73. During the school years 1964 through 1971, a number of portables were added to the school, comprising a total of 13 such units, and by 1972-73, the school had some 15 portables at its location. During these years, the predominantly white elementary schools surrounding Franklin (Walnut Hill, Saunders and Yates), decreased in enrollment and at times were under capacity, although perhaps not to the extent shown by the plaintiff's exhibits due to the discrepancy in the methods of computing capacity. In either event, those schools were operating at total enrollments which, from the evidence before this Court, was by the very terms of the district's policy economically unsound inasmuch as its studies indicated that schools of less than 500 enrollment involve higher overhead costs than those which enroll from 500 to 1000 pupils. Some of the students in the Franklin school zone were as close or closer to those predominantly white schools as they were to Franklin elementary school. During the years referred to above, Walnut Hill added two portable classrooms and Saunders elementary school added a two-room annex.

In the years 1962-71, portables and cottages were also added to the Clifton Hill elementary school to relieve the ever-increasing student enrollment therein. By 1970-71, Clifton Hill had seven cottages and four portable classrooms on its site. During the above-mentioned years, the elementary schools adjacent to Clifton Hill (Walnut Hill, Rosehill, and Fontenelle), which were predominantly white, were at times under capacity, subject to the same question of degree as was present with reference to Franklin. Again, the location of Clifton Hill attendance boundaries indicates that some students living therein were as close or closer to the aforementioned predominantly white schools as they were to Clifton Hill.

The district offered evidence of maps which purported to show, by years, the "dividing" lines in both Franklin and Clifton Hill which represented a showing that in the area east of the line the population was black and to the west thereof it was predominantly white. These maps and the lines indicated thereon were developed by utilizing the 1970 census maps and analyzing the location of the black population in prior years by reference thereto, and are admittedly not totally free from possible error due to the somewhat complex method of attempting to place the line in prior years on the basis of a subsequent year's census. However, if they are reasonably accurate, the evidence would indicate that if any boundary changes had been made between Franklin or Clifton Hill during the years in question, in an attempt to take a portion of the students from those areas and put them into one or more of the surrounding predominantly white and somewhat under capacity elementary schools, the result may very well have increased segregation in the Franklin and Clifton Hill Schools. The adjustments would presumably have occurred in those areas of Franklin and Clifton Hill zones which were a greater percentage white, thus depleting the white population therein and leaving those schools even more segregated.

Notwithstanding the possible segregative effects of boundary adjustments, the fact remains that evidence was offered to show that it was possible for the district to have transferred certain classes out of Franklin and Clifton Hill zones into the adjacent areas which would have helped relieve overcrowding in those schools, and may have eliminated the addition of the number of portables and cottages that were otherwise required therein to accomodate the rising enrollments. It appears that this could have been done without doing damage to the neighborhood school concept because certain portions of the school areas in Franklin and Clifton Hill are relatively close to the elementary schools surrounding them which were mentioned above, and transferring entire grades had been done on prior occasions. The cost factor in transporting students in order to transfer an entire grade is certainly a major consideration, but there is likewise considerable expense involved in providing portables and renovating cottages.

OPTIONAL ZONES

The general practice in the district is that children in elementary school zones go to certain junior high schools within the general geographical locations of those elementary schools when they attain junior high age.

However, the school system does operate several optional areas. If a student lives in a non-optional elementary zone, he may be directed to go to a certain junior high school. If he lives in an optional elementary zone, he is given an option to attend a number of different junior high schools.[4]

Technical Junior High School, located in a portion of the Technical Senior High building, was closed after the school year, 1971-72. At that time it had an enrollment of 551 black students and 48 white students. Tech Junior High, majority black since 1962-63, became predominantly black in 1966-67. In 1971-72, certain elementary zones had options to attend Tech Junior High: Walnut Hill (5.2 per cent black) located to the east and somewhat north of Tech, had an option to go to either Tech, Lewis and Clark (which is located to the west and south of Walnut Hill elementary zone) and Norris Junior High (which is located directly south of Walnut Hill). Tech Junior High was 90 per cent black, Norris was .7 per cent black and Lewis and Clark was 1.7 per cent black. Saunders (2.8 per cent black) located just south of Walnut Hill elementary zone, had an option to go to these same junior high schools. Conestoga (93.7 per cent black), had an option to attend Tech Junior High or Horace Mann Junior High—the latter being 97.8 per cent black at that time, and located north of the Technical High School; Mason (2.1 per cent black) located to the south of Tech and in the southeastern portion of the Omaha school district, had an option to attend Tech or Bancroft Junior High (.4 per cent black) and some had the option of attending Norris Junior High. The elementary zones that feed directly into Tech Junior High with no option during the 1971-72 school year were Central grade, which was over 20 per cent black; Franklin, which was over 85 per cent black; Kellom which was over 90 per cent black; and Yates, which was 12 per cent black. As pointed out above, Walnut Hill, Saunders, Conestoga and Mason had options to attend Tech Junior High, along with other junior high schools. Saunders, Walnut Hill and Mason were predominantly white, as were Central grade and Yates.

Even with this number of predominantly white elementary schools feeding into Tech Junior High in the years 1971-72, the student enrollment at that junior high during the year 1971-72 was 90.9 per cent black and only 48 white students were in attendance that year. Walnut Hill and Saunders are within a mile of Tech Junior High, yet in 1971-72, only 1 white student from each of those schools attended Tech Junior High. This would indicate that the students in those predominantly white optional schools exercised their options to attend other junior high schools and the ones without options utilized the schools' transfer policy which will be discussed, *infra,* to transfer out of Tech Junior High and into another school. It would appear from looking at the map that elementary students in the Mason zone would likely have had to travel farther to North or Bancroft than they would have had they gone to Tech Junior High. The same is true as to Walnut Hill, as it is generally with Saunders.

During the 1971-72 school year approximately 600 students were enrolled at Tech Junior High School. There was evidence offered which would show that the capacity for Tech Junior High, at least in 1964-65, was 795 pupils. This determination was based on a 30 pupil per classroom computation. However, the evidence shows that this number is not necessarily the best for educational purposes and is not an accurate number to determine the school's capacity because inner-city schools, as Tech Junior High, have lower teacher-student ratios as a policy of the school. Junior high classes are smaller generally speaking, than elementary classes and special education classes, which Tech Junior High had, are necessarily smaller. Thus, there is evidence that the capacity of the schools based on the 30 pupils per classroom was not necessarily a proper guideline and that some of the capacities listed in the various studies are not accurate. It would appear that capacity at Tech Junior High was not as large as indicated in the government's exhibit 8A. However, whether or not its enrollment was under capacity at this time, the optional zones in effect in 1971-72 were instrumental in allowing Tech Junior High, which was located in a predominantly white neighborhood as of 1970, to become predominantly black.

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[4] Another example of the use of an optional policy occurred when Tech Junior High was closed after 1971-72. At that time the majority black schools were given an option of having the seventh grade of their elementary school continue for a one-year period. Plaintiff argues that this shows an attempt to "wed" the blacks to their black community. However, this option was also given to the parents at the other feeder schools for Tech Junior High if they could get enough pupils and, therefore, this option neutralizes the option given to the majority black schools as to the segregative intent to be inferred therefrom.

From the testimony and various exhibits, it would seem that the most apparent reason for assigning certain elementary zones as optional zones to the surrounding junior high schools is that those schools generally are adjacent to the optional zones. For example, surrounding Walnut Hill is Lewis and Clark on the west, Norris on the north and Tech on the east. Surrounding Saunders is Lewis and Clark on the west; Norris on the south; and Tech on the east. Since the distance factor was material and important in designating various optional schools, this has some bearing and makes the optional zones more reasonable in this case.

Also the government points out that white students are not always allowed to transfer out of black areas. In 1957-58, Franklin elementary seventh and eighth graders were assigned to Tech which was then predominantly white. It further points out that one of the explanations for fewer students going to Tech Junior High from Mason in 1971-72 could very well be the fact that between Tech Junior High and Mason is a stretch of primarily business and commercial-industrial and also the Dodge Street interchange was going through in 1965-66 at the time that Mason was converted to a K through 6 institution, and its seventh and eighth graders were assigned to different areas.

All the evidence taken together would seem to show that the use of these optional zones may have had some segregative effect, but the question remains whether segregative intent is a valid inference.

GRADE STRUCTURES

This particular area is somewhat related to that of the optional zones. The district started developing plans for a junior high system in the 1950's with Monroe Junior High. This was followed by Norris, Indian Hills, Horace Mann, McMillian and Lewis and Clark. Technical Junior High was designated as such in the early 1960's. The district's policy is that of phasing out all K-8 facilities.[5] During the school year 1964-65, there were certain elementary schools that still had K-8 and, therefore, were not assigned to any junior high schools. They are as follows: Jackson (.3 per cent black); Mason (3.7 per cent black); Pershing (0 per cent black); Sherman (.5 per cent black); Walnut Hill (2.5 per cent black); and Yates (.3 per cent black). By consulting the exhibits concerning elementary school attendance areas, one can see that all of these schools were in the general vicinity of Tech Junior High and the Franklin, Clifton Hill areas.

Of the schools above mentioned that were still K-8 in 1964-65, Walnut Hill converted in 1967-68 and it started that school year with 98.2 per cent white. The students eligible for junior high in Walnut Hill were given options to attend Lewis and Clark, Norris or Tech as pointed out above. Saunders converted in 1964-65 when it was 100 per cent white and was given similar options to attend Lewis and Clark, Norris or Tech Junior High. Mason was converted in 1965-66 at which time it was 97.3 per cent white and had options to attend Bancroft, Norris or Lewis and Clark. Plans were made to convert Yates for the school year 1969-70 (when it was predominantly white) but due to opposition from various parents, it was continued as K-8 for another year. This plan to convert Yates was apparently just a proposal when the various parents spoke against it, and the following year, 1970-71, the seventh and eighth grades were closed, even though there was some continued protest that it not be closed. Jackson, Pershing and Sherman are elementary zones that still have seventh and eighth grades and, hence, no options. Central Park, Monmouth Park and Miller Park all converted in 1958-59 at which time they were 100 per cent white and they were not given options but were assigned specifically to McMillan Junior High which was then 100 per cent white and continues to be a predominantly white school.

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[5] Kindergarten through eighth grade.

The government's position is that since there were a number of predominantly white schools in an area around Tech Junior High and Horace Mann Junior High (both majority black) that were still K-8 schools as late as 1964-65, there is an indication that the district was allowing the students in those predominantly white elementary zones to stay there two years longer rather than directing them to exercise an option to attend Tech Junior High or some other school zone that was predominantly black. Its position is also based on the fact that the elementary zones that converted most recently were those surrounding the black areas in Omaha and thus it infers that this was a final holdout in an attempt to allow elementary school zones to keep themselves and their predominantly white enrollment together and not force children to attend junior high schools which would probably be in an area with a greater black percentage than were their elementary zones.

The district contends that the conversion from K-8 to K-6 is historically a gradual process. It maintains that the conversions to K-6 facilities in the district have not

been managed in such a way as to increase or encourage segregation and attempts to show a logical basis for such late conversions by evidence to the effect that the schools in question were ones which were to have been assigned to a number of junior highs in the City that were eventually not constructed and thus were converted only when the decision not to construct those schools was finally made. These junior high schools were: (a) a central city junior high school which was to be located essentially south of the business district in Omaha; (b) one on Western Avenue, located some twelve blocks north of Dodge Street, the main east-west street in the City of Omaha, running from 50th Street to 78th Street, from 83rd Street to 90th Street, and from 90th to 96th Street (this latter junior high school later merged into Lewis and Clark); (c) a junior high in Miller Park, the site for which the district failed to acquire and which ultimately merged into what is now McMillan Junior High located in the northern part of the district and on the eastern boundaries thereof (the building of McMillan at this place isolated the Sherman elementary zone which is located just directly east and adjacent to the McMillan zone and the Pershing zone which is located to the southeast of Sherman and directly south of the Omaha Eppley Airfield; this would seem to explain the reason why these two schools have not yet been converted from K-8 to K-6); (d) a junior high along Paxton Boulevard, which runs between 31st and 32nd Streets in the northern part of Omaha, which was not built because of changing conditions and circumstances.

TRANSFER POLICIES

In addition to the fact that Tech High School and Central High School are "open" schools,[6] and in conjunction with the optional zone policy which was discussed, *supra,* the district also has another method by which students can attend areas other than those in which they live and those which may be closer to their homes. This method is commonly referred to as the "open transfer" policy, which was introduced into the system in 1964 during the administration of Doctor Paul A. Miller, who was then Superintendent of Schools. It resulted from the study and recommendation of a biracial committee which was appointed by the Mayor of Omaha in the Spring of 1963. The following conditions govern the ability to transfer from the zone of residence to another school:

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[6] This means generally that students of high school age who do not live in those zones have a choice of going to those high schools if they choose to do so. The students who live in the Tech or Central zones, however, must attend the high school in their respective zone.

(1) The achievement level of the pupil requesting transfer shall equal the average level of achievement of the pupils in the grade in the school to which the transfer is being requested.

(2) The school to which the pupil is transferring cannot be an overcrowded school.

(3) Transportation of pupils is the responsibility of the parents.

(4) The transfer request must be in writing on an individual basis.

(5) Permission to transfer shall not be granted until enrollments are ascertained.

Prior to the adoption of this policy, transfers were allowed only for reasons of health or hardship. Students could not transfer for the reason that the student did not want to attend a school with black pupils, or because he felt that he was going to an inferior school or because the educational progress in another school was superior in his opinion. The primary and stated purpose of the open transfer policy of 1964 was to encourage and upgrade the academics of the school system. The program was viewed as having no connection with segregation or integration.

To utilize this policy, parents make written request for transfer which request is placed on file with the particular school which is desired. The district then communicates with the principal of the school in question to determine the space and specific problems involved and also communicates with the parents to suggest alternative methods if space is not available or if for some reason transfer cannot be granted. Aside from the five determining factors set forth above, other considerations include special education or medical problems. In addition, the administration of the school also looks to problem situations or learning situations and may grant a transfer in a situation where a student may stand a better chance to succeed in the transferee school. Financial hardship cases are also considered.

The transfer request forms do not include a space for designation of the race of the applicant. However, the district does maintain records which happen to show the race of some students and at times there are interviews by the administration with the parents of the student requesting the transfer. Approximately one-third of the transfer requests are dealt with on an interview basis. Additionally, the transfer request forms have a space for the requesting party to indicate any reasons as to why the request is made. There was testimony that these reasons are not necessarily taken into account in the granting or denying of transfer requests, but they are often utilized in hardship cases. This is a matter of practice, not of any standard policy.

Once a student obtains a transfer to a particular school, he must re-apply for a transfer if he desires to attend that particular school, or another outside his attendance zone for the next year. If he wishes to choose another school available to him under an option (other than the one initially chosen) he must likewise obtain a special transfer. The same procedure is applicable in the case of high school level transfers.

At the time this transfer policy was introduced there was some evidence of opposition from members of the minority race that this program would work against the poor and the black students because of the requirement of equal achievement and the parents having to transport their children. Additionally it was argued that the requirement that the size of the class in the receiving school be no larger than the size of the class of the transferor school would have an adverse effect due to the fact that the inner-city school classes generally were smaller than others pursuant to school policy.

However, Dr. Miller testified that he knew of no instance where a transfer was denied on the basis of achievement levels during his tenure except for situations where an individual who needed a special education class attempted to transfer from a school that employed such classes into a school which did not. He further testified that the ultimate purpose of the policy was to encourage transfers into better schools for all children concerned.

As to the actual results of this transfer policy, the government introduced Exhibits 26, 26A, B, and C, which purport to represent certain transfer requests by black and white students out of majority black schools into predominantly white schools during the school year 1970-71. (There was considerable controversy over the foundational soundness of these exhibits.) Plaintiff's Exhibit 26 indicates that there were white transfers allowed out of black schools into predominantly white schools specifically for racial reasons, as well as others. However, the exhibit does not include transfers by white students from a majority white school to another majority white school which is less white than the school to which he had been originally assigned. Also there were no computations as to the number of white students transferring from majority white schools into majority black schools. The testimony of a government attorney who participated in examining the school records and photographing them, one William C. Graves, indicated that the rule of thumb followed in preparing the exhibit was to separate out any requests that may have had a potential racial effect, either segregative or desegregative. At the time the government witnesses were looking through this file, they had no idea as to the race of the children involved and they later attempted to correlate the race with the students. Graves explained that they photographed transfers from majority black into majority white schools and from majority white into majority black schools and additionally noted any transfer requests that were approved which appeared to consider a racial reason, no matter what the schools were. He testified that they also considered those requests which were denied and which had listed a racial reason. The district's evidence on this question indicated that certain portions of Exhibit 26 were substantially less than accurate, specifically those sections dealing with the transfers of black students from majority black schools to majority white schools.

The district pointed out that there were a number of transfers from black schools to Benson West school. The transferor schools in this case were Holy Name, which is located in Franklin and Clifton Hill attendance zones, and Kennedy elementary school, which is a majority black school, as well as others. (See defendants' Exhibits 21 through 38.) The government's research analyst, Cindy Aleksa, testified from her notes that apparently no photographs were taken of any transfer requests to Benson West. There were 24 to 25 students involved in these transfers from black schools to majority white Benson West, and therefore, Exhibit 26, page 10, which indicates the total black transfers out of elementary schools to predominantly white schools in 1970-71 is claimed to be inaccurate by 50 per cent. The district also pointed out that some of the dates in Exhibit 26 were misleading and failed to include situations where the school district denied transfers for racial reasons, as where a white mother in Clifton Hill sought a transfer for her child to Fontenelle Park and gave as a reason the fact that more white girls would be in Fontenelle Park for her to associate with. This request was denied.

Thus, there were certain discrepancies pointed out in Exhibit 26 regarding the number of black students who were allowed to transfer to predominantly white schools and regarding the nature of the transfers which were allowed from black schools to majority white schools. Although the evidence shows that black students were granted transfers on nearly as equal a percentage as were white students, and that black students did transfer to white schools, it also appears that some black students were denied access to a majority white school (Lewis and Clark) for the school year 1970-71 for the reason that it was overcrowded, whereas at the same time some white students were allowed to transfer from majority black schools into that school.

It would appear that Exhibit 26 has some probative value for the government's contentions as to the transfer issue but that the exhibit is incomplete and inconclusive. This issue should be better investigated and thoroughly presented at trial where the exhibit can be comprehensive and the evidence in connection therewith fully developed by both parties.

INTEGRATION

Some integration of school children has occurred in the school district over the past years. In some of the predominantly black schools in the district, the membership of black students declined from 1967-68 to 1972-73 (defendants' Exhibit 48). Furthermore, the evidence shows that although there has been an increase in the number of schools with a predominantly minority enrollment (80 per cent or more), the total percentage of the total minority attending those schools has dropped 20 per cent since 1962. Additionally, schools with some minority enrollment have increased noticably in the last ten years and, in 1972, 45 per cent of the total minority students attended majority white schools (defendants' Exhibit 4). Although this reference to "minority" includes Orientals, Indians, and Spanish surnamed Americans, as well as black students, it does show a trend of some integration occurring in the district since 1962.

CONCLUSIONS OF LAW

The relief requested by the plaintiff, to wit: a preliminary injunction, is traditionally viewed as relief of an extraordinary nature and does not purport to be a disposition of the matter on its merits. An injunction, since it is viewed as an extraordinary remedy, is not routinely granted. *Yakus v. United States,* 321 U. S. 414 (1944); *Sierra Club v. Hickel,* 433 F. 2d 24, 33 (8th Cir. 1970) aff'd, 405 U. S. 727 (1972); *Checker Motors Corp. v. Chrysler Corp.,* 405 F. 2d 319, 323 (2nd Cir.), *cert. denied,* 394 U. S. 999 (1969); *Huron Valley Publishing* Co. v. Booth Newspapers, Inc., 336 F. Supp. 659, 661 (E. D. Mich. 1972). As stated in *Benson Hotel Corp. v. Woods,* 168 F. 2d 694, 696 (8th Cir. 1948):

> "The application for such an injunction does not involve a final determination on the merits; in fact, the purpose of an injunction pendente lite is not to determine any controverted right, but to prevent a threatened wrong or any further perpetration of injury, or the doing of any act pending the final determination of the action whereby rights may be threatened or endangered, and to maintain things in the condition which they are in at the time . . . until the issue can be determined after a full hearing."

See also *Hamilton Watch Co. v. Benrus Watch Co.,* 206 F. 2d 738, 742 (2nd Cir. 1953); *Perry v. Perry,* 190 F. 2d 601, 602 (D. C. Cir. 1951).

This Court soundly supports the foregoing view of the nature of such preliminary relief. Due to the time factor involved in the present situation, and in the majority of the situations where this type of remedy is pursued, it is not the province nor the design of this Court to provide a finding on the ultimate issues of law and fact at this time. Such a finding should be made only after all parties have had ample opportunity to employ the liberal discovery processes offered by the Federal Rules and to otherwise prepare the matter in detail for presentation to this Court in a manner conducive to sound and deliberate legal determination. With the foregoing in mind, the Court will proceed to analyze the present issues within these legal concepts.

The granting or denying of injunctive relief at the preliminary stage of any matter requires the consideration of a number of varying factors. The two that present the starting point in any such determination are (1) the question of ultimate success on the merits; and (2) irreparable harm to be suffered by those seeking such relief in the absence of the same being granted. The Eighth Circuit Court of Appeals has recently held that when viewing the first of these factors, the Court must determine whether the movant, herein the Justice Department, has sustained its burden of showing "*substantial* probability of success at trial." *Minnesota Bearing Co. v. White Motor Corp.,* 470 F. 2d 1323, 1326 (8th Cir. 1973). In assessing the relative merits of a prayer for injunctive relief, the following formulation of factors to be considered within the two foregoing major considerations is instructive:

> "(1) The significance of the threat of irreparable harm to plaintiff if the injunction is not granted;
>
> "(2) The state of the balance between this harm and the injury that granting the injunction would inflict on defendant;
>
> "(3) The probability that plaintiff will succeed on the merits; and
>
> "(4) The public interest."
>
> 11 C. Wright and A. Miller, *Federal Practice and Procedure,* Section 2948 at 430-431 (1973).

See e. g., Kansas-Nebraska Natural Gas Company v. City of St. Edward, 135 F. Supp. 629 (D. Neb. 1955) (Delehant, J.). *Cf. Middle West Motor Freight Bureau v. United States,* 433 F. 2d 212, 241 (8th Cir. 1970), *cert. denied,* 402 U. S. 999 (1971).

PROBABILITY OF SUCCESS

The Court has carefully studied the cases cited by both the district and the government in their respective briefs, as well as other cases, in the area of school segregation. Certain general and well-known principles seem to be clear.

De jure, or deliberate, racial segregation in public schools is violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution. *Brown v. Board of Education,* 374 U. S. 483 (1954). In order to support a finding of *de jure* segregation, it is not necessary that there be complete separation of the races. The actions of a school board may be sufficient to constitute *de jure* segregation without being based on a state law, or even if they are in derogation of state law forbidding segregation. *United States v. Board of School Commissioners of Indianapolis, Indiana,* 332 F. Supp. 655 (S. D. Ind. 1971), *aff'd,* 474 F. 2d 81, 83 (7th Cir. 1973), *cert. denied,* 41 U. S. L. W. 3673 (June 25, 1973).

A neighborhood school plan is not unconstitutional *per se* and is permissible if impartially maintained and administered, even though the result is racial imbalance. *United States v. Board of Education, Independent School District No. I, Tulsa County, Oklahoma,* 429 F. 2d 1253 (10th Cir. 1970), *aff'd after remand,* 459 F. 2d 1253 (10th Cir. 1972), *vacated and remanded on other grounds,* 41 U. S. L. W. 3671 (No. 72-190, June 26, 1973). A school district has no affirmative obligation to achieve a balance of the races in the schools when the existing imbalance is not caused by school policies and is the result of housing patterns and other forces over which the school administration has no control, but it does not follow from the absence of a duty to achieve racial balance that a Board may deliberately select sites to achieve racial segregation. *Davis v. School District of the City of Pontiac,* 309 F. Supp. 734 (E. D. Mich. 1970), *aff'd and remanded,* 443 F. 2d 573 (6th Cir.), *cert. denied,* 404 U. S. 913 (1971), *vacated and remanded in part,* 474 F. 2d 46 (6th

Cir. 1973). *Deal v. Cincinnati Board of Education,* 369 F. 2d 55 (6th Cir. 1966), *cert. denied* 389 U. S. 847 (1967), *aff'd after remand,* 419 F. 2d 1387 (6th Cir. 1969), *cert. denied,* 402 U. S. 962 (1971). If residential racial discrimination exists, it is immaterial that it results from private action. In some cases the school board still cannot build its exclusionary attendance areas upon private racial discrimination. *United States v. Board of Education, Independent School District No. 1, Tulsa County, Oklahoma, supra.* If a neighborhood school policy is formulated with no intent or purpose to maintain segregation or to segregate, then no constitutional duty exists to desegregate even if racial imbalance exists. There is no affirmative duty to change school attendance districts by the mere fact that shifts in population either increase or decrease the percentage of either black or white pupils. *Bell v. School District, City of Gary, Indiana,* 324 F. 2d 209 (7th Cir. 1963), *cert. denied,* 377 U. S. 924 (1964); *Downs v. Board of Education,* 336 F. 2d 988 (10th Cir. 1964), *cert. denied,* 380 U. S. 914 (1965).

A school board may not purposefully tailor the components of a neighborhood school attendance policy so as to conform to the racial compositions of the neighborhoods and its school district, nor may it build upon private residential discrimination. *Spangler v. Pasadena City Board of Education,* 311 F. Supp. 501 (C. D. Cal. 1970); *United States v. School District 151 of Cook County, Illinois,* 286 F. Supp. 786 (N. D. Ill.), *aff'd,* 404 F. 2d 1125 (7th Cir. 1968).

Acts of omission can be as serious as acts of commission where a Board of Education has contributed to and played a major role in the development and growth of a segregated situation and could support a finding that the Board is guilty of *de jure* segregation. *Davis v. School District of Pontiac, supra,* 309 F. Supp. 734.

The decision of where or where not to construct new schools when combined with one technique or another of student assignment may very well determine the racial composition of the student body in each school in the system. People tend to gravitate towards school facilities just as schools are located in response to the needs of the people. *Swan v. Charlotte-Mecklenberg Board of Education,* 402 U. S. 1 (1971). In this connection, open transfer policies are not in themselves unconstitutional. However, where the intended and inevitable effect of such a policy is to aggravate and increase racial segregation, action should be taken to eliminate those segregative effects. *Monroe v. Board of Commissioners,* 391 U. S. 450 (1968).

The practice of a school district in its assignment of faculty members on the basis of race, in such a manner that those faculty member assignments allow the school to be recognized and considered a "black" or "white" school, is not consistent with the protection of the Fourteenth Amendment. *Swan v. Charlotte Mecklenberg Board of Education, supra,* 402 U. S. 1; *Kelly v. Altheimer, Arkansas Public School District,* 378 F. 2d 483, 498-499 (8th Cir. 1967).

The recent pronouncement by the Supreme Court in *Keyes v. School District No. 1, Denver, Colo.,* 41 U. S. L. W. 5002 (June 21, 1973), requires that the government must prove not only that segregated schooling exists, but also that it was brought about or maintained by intentional action. The following quote from a recent case of *Booker v. Special School District No. 1, Minneapolis, Minn.,* 351 F. Supp. 799, 807-808 (D. Minn. 1972), sets forth what this Court believes to be the general rule and the outline of proof necessary to demonstrate a violation of the Fourteenth Amendment:

> "However, it is beyond dispute that:
>
> (a) if the state and/or the school administration has taken any action with a purpose to segregate, and
>
> (b) if that action has had the effect of creating or aggravating segregation in the schools of the District, and

(c) if segregation currently exists, and

(d) if there is a causal connection between the acts of the school administration and the current condition of the segregation,

then there is segregation which is imposed by law; and such is prohibited by the Fourteenth Amendment to the Constitution."

This constitutes *de jure* segregation and is violative of the Fourteenth Amendment.

The evidence presented by the government has been primarily designed to show specific acts of the school district, to wit: transfer policy, attendance zones, teacher assignment, school site location and portable classrooms, in an attempt to demonstrate that these particular acts have a bearing on the intent of the school district when the results of those actions are determined. To be sure, the cases cited by the government and those found by the Court's independent research indicate that these factors in the proper context are indicia of segregative intent. However, the Court also notes that there is evidence presented of reasonable school-related reasons for introducing and implementing such plans and in the absence of findings at this stage of segregative intent, no affirmative duty attaches to the school district. The finding of segregative intent necessarily requires the Court to infer such intent from certain objective acts. This is not easily done and cannot be done or justified in the state of the present record. The fact finding process that this Court must undertake in determining subjective intent from objective manifestations requires a full hearing on the merits. Therefore, although the Court at this stage might see a possibility of the government's prevailing on the merits when the matter is fully tried, it does not find at this stage of the proceedings that there appears to be a *substantial* probability of ultimate success at trial.

IRREPARABLE HARM

As pointed out above, the injury or harm that will occur to the movant-plaintiff is of the utmost importance in the consideration of the relief now requested. However, the harm to be suffered by the opposing party is also properly considered. *See, e. g., Penn Galvanizing Co. v. Lukins Steel Co.,* 468 F. 2d 1021, 1023 (3rd Cir. 1972); *Sierra Club v. Hickel, supra,* 433 F. 2d at 33; *Congress of Racial Equality v. Douglas,* 318 F. 2d 95, 97 (5th Cir.), *cert. denied,* 375 U. S. 829 (1963). The Court has attempted to determine and weigh the harm that will be suffered by all concerned if this injunction is granted or denied. The government rests its main contention of irreparable harm on the fact that a Constitutional right will be denied the children who are forced to remain in segregated schools if the injunctive relief is not granted. It also contends that children will be forced to leave an integrated school, Monroe, and go to a segregated school, King. In addition, it maintains that irreparable harm will be suffered if King is allowed to be opened and stigmatized as a "black" school. On the other hand, the district maintains that at this late date, an injunction closing Martin Luther King or requiring it to be immediately integrated, would require changes in student assignments, teacher assignments, and would require that many pupils return to Franklin and Clifton Hill, both of which were severely overcrowded before the construction of King. As to the transfer policy, the government maintains that all that would be required is that the students be returned to the school which they attended last year. In rebuttal, the district maintains that changing the schools which students will attend at this late date will create serious problems with parents who have provided for babysitters for their children in a certain area of their work; interrupt curriculum in the schools; interrupt extra-curricular activities; and generally result in a state of confusion if relief must be administered before this coming Tuesday, September 4, 1973.

The Court is not unmindful of the fact that its determination of irreparable injury to the respective parties must depend somewhat on its determination of the likelihood of success on the merits. As pointed out above, the government certainly indicates some possibility of succeeding on the merits, but it has failed to prove a *substantial* likelihood of success at this point. The Court finds that the harm to the district and all the children of the Omaha School District at this point, including the class which the plaintiff represents, would be greater than the harm in continuing "possible" unconstitutional segregation. The Court reaches this conclusion after careful deliberation and is aware of the possible injury or harm that may be incurred by the students if a violation of the Fourteenth Amendment is found to exist after a full hearing on the merits. On the other hand, at the present time, a granting of this injunction would require many students to return to portables and cottages used at Clifton Hill and Franklin where overcrowded conditions have clearly existed which King is at least in part designed to alleviate. Further, the confusion resulting by revoking all the transfers given this summer would be mammoth, as would the confusion with reference to the re-planning and re-programming of curriculum, extra-curricular activities and teacher assignments.

In addition to balancing the relative harms that would be suffered by the defendants or plaintiff and the class it represents in this suit, the Court when analyzing the granting or denying of a preliminary injunction, may also legitimately consider the public interest. *Yakus v. United States, supra,* 321 U. S. at 414. The Court finds that the public interest in opening schools on September 4, 1973, in a relatively unconfused and stable manner, is important to the children and may very well alleviate and cause less problems than would any purported segregated situation.

In conclusion, this Court finds that the motion for a preliminary injunction should be denied. In doing so, it in no way indicates that the government does not have a possibility of success at the trial herein. The denial stems from the evidence so far presented and in the record to date there has been no showing of substantial probability of success. In order to ascertain the intent of the district over the years in question, a full hearing on the merits is clearly required, so that this Court can carefully examine and weigh the facts within the context of their occurrence. As stated in ***Webb v. Board of Education of the City of Chicago,*** 223 F. Supp. 466 (N. D. Ill. 1963), which involved strikingly similar issues to the questions presented here:

> "It is not necessary for the Court to determine at this time the respective merits of these contentions. We need only note that substantial questions of fact are raised as to whether the segregation complained of is the result of an active and intentional design of the defendants."

Accordingly, plaintiff's motion for a preliminary injunction is denied, the order of denial being separately entered herein.

By the Court:

/s/ Albert G. Schatz,
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CIV. 73-0-320

UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE SCHOOL DISTRICT OF OMAHA, STATE
OF NEBRASKA, et al.,
Defendants.

ORDER

(Filed August 31, 1973)

This matter coming on for hearing on the plaintiff's Motion for Preliminary Injunction, and the Court being fully advised in the premises,

IT IS ORDERED, ADJUDGED AND DECREED that said motion be and the same is hereby denied; that a memorandum opinion containing the Court's findings of fact and conclusions of law will be prepared and filed by the Court in accordance with this order, at a later date.

DATED this 31st day of August, 1973.

By the Court:

/s/ Albert G. Schatz,
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CIV. 73-0-320

UNITED STATES OF AMERICA,
Plaintiff,

and

NELLIE MAE WEBB, et al.,
Applicants for Intervention,

vs.

THE SCHOOL DISTRICT OF OMAHA,
State of Nebraska, et al.,
Defendants.

MEMORANDUM OPINION

(Filed November 27, 1973)

This matter is before the Court on motion for intervention, or in the alternative for consolidation, filed by the above-named applicants, in a cause pending before this Court since August 10, 1973. Applicants move for the entry of an order allowing their intervention as plaintiffs pursuant to Rule 24 (a) (2), Federal Rules of Civil Procedure. Alternatively, applicants seek intervention pursuant to Rule 23 (b) (2). In the event intervention is denied, applicants move that the Court consider the complaint filed by them as initiating a separate action and that the same be consolidated with the pending action pursuant to Rule 42 (a).

Applicants are black parents and their children who reside within the Omaha Public School System. The children-plaintiffs attend schools in the system. The complaint filed by the applicants and attached with their motion for intervention alleges that officials of the Omaha Public School System have engaged in racial discrimination in the operation of the Omaha Public Schools in violation of the Fourteenth Amendment to the United States Constitution. On August 10, 1973, the Attorney General, on behalf of the United States, filed suit in this Court pursuant to Title IV of the 1964 Civil Rights Act (42 U. S. C. § 2000e-6 (a) and (b)) against the Board of Education of the School District of Omaha, its members and the Superintendent of the Omaha Schools. This complaint also alleges, *inter alia,* that defendants have engaged in racial discrimination in the operation of the Omaha Public School system in violation of Title IV of the Civil Rights Act of 1964 and the Fourteenth Amendment to the Constitution of the United States.

Applicants herein assert that they are entitled to intervene in the aforementioned suit filed by the Attorney General as a matter of right pursuant to Rule 24 (a) (2), *supra.* This Rule (intervention of right) provides that "upon timely application, anyone shall be permitted to intervene in an action: * * * when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

So far as this matter is concerned, Rule 24 (a) (2) establishes three conditions for intervention of right: the applicant's interest must relate to the property or transaction which is the subject of the principal action; applicant must be so situated that the disposition of the main action may as a practical matter impair or impede his ability to protect that interest; and that applicant's interest is not adequately represented by existing parties. The Court has no doubt that the claims of the applicants herein relate to the transaction which is the subject matter of this action and that applicants are situated so that a disposition of the action herein may, as a practical matter, impair or impede their ability to protect their interest. However, the Court finds that the motion to intervene, as a matter of right, must fail because of the third condition, *supra.*

So far as adequacy of representation is concerned, the controlling rule is well settled "that representation is adequate if there is no collusion between the representative and an opposing party, if the representative does not have or represent an interest adverse to the applicant, and if the representative does not fail in the fulfillment of his duty." *Peterson v. United States,* 41 F. R. D. 131 (D. Minn. 1966). *See also Stadin v. Union Electric Co.,* 309 F. 2d 912 (8th Cir. 1962), *cert. denied,* 373 U. S. 915 (1963). All of these conditions have been met in this case. Clearly there has been no collusion between the existing parties, and indeed, there is no allegation or evidence of any collusion, or of any nonfeasance or neglect of duty. Further, the representative (plaintiff, United States of America) does not have or represent an interest adverse to the applicants-intervenors. Their respective goals are neither conflicting nor potentially conflicting and both the representative-plaintiff and applicants pursue the same end result. Nor can it be said, and it does not appear that the applicants seriously contend, that plaintiff has failed in any segment of its duty to assert the interests that the intervenors would support. Counsel for plaintiff have acted vigorously and efficiently in this regard and the record thus far reflects diligence and thoroughness. This Court has no doubt that applicants have been and still are afforded more than adequate representation by the plaintiff.[1] *See United States v. Board of School Commissioners, Indianapolis,* 466 F. 2d 573 (7th Cir. 1972), *cert. denied, sub nom,* 410 U. S. 909 (1973); *Moore v. Tangipahoa Parish School Board,* 298 F. Supp. 288 (E. D. La. 1969).

Applicants urge a liberal interpretation and construction of Rule 24 (a) (2) and it would appear that the Courts in this District and the Court of Appeals for the Eighth Circuit have traditionally followed this view. However, as stated in *Peterson v. United States, supra,* " 'liberality, however, does not equate with rights of indiscriminate intervention.' The bounds of the Rule are to be observed."

Alternatively, applicants pray for leave to intervene under Rule 24 (b) (2), Federal Rules of Civil Procedure, providing for permissive intervention. This rule, as applicable here, provides that upon timely application, anyone may be permitted to intervene in an action when the applicants' claim or defense and the main action have a question of law or fact in common. If these conditions are met, the trial court may, in its discretion, permit intervention if to do so would not unduly delay or prejudice adjudication of the rights of the original parties.

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[1] "When intervenors claim they are not being adequately represented by the Government, courts should be very hesitant to hold such representation inadequate, 'at least in the absence of any claim of bad faith or malfeasance on the part of the Government * * *.' **Sam Fox Publishing Co. v. United States,** 1961, 366 U. S. 683, 689, 81 S. Ct. 1309, 1313, 6 L. Ed. 2d 604; **Blocker v. Board of Education of Manhasset, supra,** 229 F. Supp. at 715. See generally, 4 Moore's Federal Practice, Par. 24.08." **Moore v. Tangipahoa Parish School Board,** 298 F. Supp. 288, 292, n. 10 (E. D. La. 1969).

It is beyond dispute that the claims of intervenors are based upon common questions of law and fact with the issues raised in the main action and, although not entirely prompt, the intervention sought here cannot be said to be completely untimely. Although the issues in the main action have been made up and drawn since September 18, 1973, and although a lengthy hearing has heretofore been held with regard to plaintiff's motion for a preliminary injunction, and although discovery proceedings have already been instituted, the longest portion of the road lies ahead. In view of these conditions having been met, this Court may permit intervention under Rule 24 (b) (2), *supra,* if to do so would not unduly delay or prejudice adjudication of the rights of the original parties, and in this connection the Court believes there will be no undue delay nor will the presence of the applicants-intervenors interfere with or prejudice the rights of the present parties so far as an adjudication on the merits is concerned. It should be noted here that so far as discovery proceedings are concerned, the Court has already, as of the day the motion to intervene was heard, permitted the applicants to participate in any discovery which was to be carried out pending this Court's determination of whether to allow intervention herein.

However, in permitting intervention under Rule 24 (b) (2), which the Court is allowing, the intervention will be subject to the following conditions in order to protect the interests of the original parties and permit due and efficient administration of justice:[2]

(1) Intervenors will not be permitted to assert any defenses or claims previously adjudicated by the Court;

(2) Intervenors may not reopen any questions that have previously been decided by the Court;

(3) All evidence heretofore adduced, prior to intervention, shall stand and be read as evidence bearing upon the existence and enforceability of the alleged rights and claims of intervenors, so far as pertinent thereto, and shall be considered by the Court in the determination of said rights and claims subject to such objections to said evidence as were made during the presentation thereof;

(4) All evidence adduced in this cause prior to intervention and proof or disproof of points common to the alleged claims of the original plaintiff and intervenors shall stand as evidence, to be considered by the Court on such common points;

(5) Discovery proceedings initiated or already completed shall stand without duplication.

It is, therefore, the order and ruling of this Court that the applicants' motion to intervene as a matter of right is denied; that applicants' motion for permissive intervention is hereby granted, subject to the conditions as set forth herein above; that in view of the Court's ruling on applicants' motion for intervention, it is unnecessary for the Court to discuss or determine applicants' motion for

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[2] Permissive intervention is often made conditional in order to protect the interests of the existing parties. See generally,

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C. Wright and A. Miller, **Federal Practice and Procedure,** **Section 1922** (1972); **Stell v. Savanah-Chatham County Board of Education,** 255 F. Supp. 88 (S. D. Ga. 1966); **Knowles v. Board of Public Instruction, Leon County, Florida,** 405 F. 2d 1206 (5th Cir. 1969); **Galbreath v. Metropolitan Trust Co. of California,** 134 F. 2d 569 (10th Cir. 1943); **Mathieson v. Craven,** 247 F. 223 (D. Del. 1917).

consolidation under Rule 42 (a). A separate order is entered this day.

By the Court:

/s/ Albert G. Schatz
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CIV. 73-0-320

UNITED STATES OF AMERICA,
Plaintiff,

and

NELLIE MAE WEBB, et al.,
Applicants for Intervention,

vs.

THE SCHOOL DISTRICT OF OMAHA,
State of Nebraska, et al.,
Defendants.

ORDER

(Filed November 27, 1973)

This matter coming on for hearing on applicants' motion to intervene as a matter of right under Rule 24(a) (2), Federal Rules of Civil Procedure, or in the alternative, to intervene pursuant to Rule 24(b)(2), of said Rules, or in the event intervention is denied, that the Court consider the complaint filed by them as a separate action for consolidation with the pending action pursuant to Rule 42(a), and the Court being fully advised in the premises,

IT IS ORDERED that applicants' motion for intervention as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure, is denied;

IT IS FURTHER ORDERED that applicants' motion for leave to intervene under Rule 24(b)(2) is granted, subject to the conditions as set forth in the Memorandum Opinion herewith filed. It is unnecessary to discuss and determine applicants' motion for consolidation under Rule 42(a).

IT IS FURTHER ORDERED that defendants are granted twenty (20) days from the date hereof to respond to intervenors' complaint filed herein.

BY THE COURT:

/s/ Albert G. Schatz
Judge, United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

CIV. 73-0-320

UNITED STATES OF AMERICA,
Plaintiff,

and

NELLIE MAE WEBB, et al.,
Intervenors,

vs.

THE SCHOOL DISTRICT OF OMAHA,
State of Nebraska, et al.,
Defendants.

MEMORANDUM OPINION

(Filed October 15, 1974)

This school desegregation case was filed by the United States on August 10, 1973, under the authority of 42 U. S. C. § 2000c-6 (a). Jurisdiction is also present under 28 U. S. C. § 1345. The defendants are the School District of Omaha, State of Nebraska; the Superintendent of Schools for the School District; and the twelve members of the Board of Education for the School District. The plaintiff's complaint alleges that the defendants have engaged in racial discrimination in the operation of the Omaha Public Schools in violation of Title IV of the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution. The defendants deny that the Omaha Public Schools have been operated in a manner which discriminates against any students on the basis of race, and affirm the School District's adherence to a racially neutral neighborhood school assignment policy.

The plaintiff's complaint was accompanied by a motion for a preliminary injunction. A full evidentiary hearing was held, and the motion was denied, *United States v. School District of Omaha, State of Nebraska,* 367 F. Supp. 179 (D. Neb. 1973). Thereafter, certain black children attending the Omaha Public Schools and their parents, representing a class of all other similarly situated black children and their parents, were permitted to intervene as plaintiffs in this lawsuit under Rule 24 (b), Fed. R. Civ. P., 367 F. Supp. 198 (D. Neb. 1973).

The trial of this case was begun on March 4, 1974, and concludued on March 20, 1974. A schedule for the preparation of post-trial briefs and proposed findings of fact was established, and the entire matter was submitted to the Court on June 5, 1974.

The Omaha Public Schools have never been operated under a statutorily or constitutionally required dual system. Therefore, the legal principles upon which claims with respect to this school system must be resolved are those set forth by the Supreme Court in *Keyes v. School District No. 1, Denver, Colorado,* 413 U. S. 189 (1973). Under *Keyes,* a constitutional violation is found where:

(1) There is a current condition of racial segregation; and

(2) This condition has been caused or maintained by intentional state action.

There is no question here that the actions of the defendants constitute state action. Nor is it open to doubt that there is a substantial degree of racial imbalance within some of the Omaha Public Schools. The issue upon which this litigation is focused is whether the racial imbalance has been intentionally caused or maintained by the defendants.

A determination of the intent of a person or a public body with respect to action or inaction on any question is necessarily difficult. In evaluating the evidence introduced at trial the Court has kept in mind certain principles concerning the finding of intent:

(1) The burden of proof on this issue lies upon the plaintiff and the intervenors to show an intentionally segregative policy practiced in a meaningful or significant portion of the school system. The burden then shifts to the defendants to show that their actions as to any other segregated schools within the system were not motivated by segregative intent. *Keyes,* 413 U. S. at 208-9.

(2) There are very few school desegregation cases in which the defendants admit segregative intent. Such intent must then be inferred from objective actions of the defendants. *United States v. Board of School Commissioners of Indianapolis, Indiana,* 474 F. 2d 81 (7th Cir. 1973), *cert. denied,* 413 U. S. 920 (1973).

(3) There is some dispute among the parties concerning how the Court is to weigh the natural and foreseeable consequences of the defendants' decisions to act or not to

act in any given area. Prior to *Keyes*, it had been held that school boards were accountable for the natural and foreseeable consequences of their actions, regardless of intent or motivation, *United States v. Texas Education Agency*, 467 F. 2d 848, 863-5 n. 25 (5th Cir. 1972). This view no longer appears to be the law in light of the *Keyes* emphasis on intent. The Ninth Circuit has specifically so held, *Johnson v. San Francisco Unified School District*, No. 71-1877 (Filed June 21, 1974); *Soria v. Oxnard School District Board of Trustees*, 488 F. 2d 579 (9th Cir. 1973). But the error reversed in *Johnson* and *Soria* was the rejection by the trial courts of the importance of determining intent, not the method of determining it. This Court is of the opinion that the natural and foreseeable consequences of the defendants' actions are neither determinative nor immaterial, but rather constitute one additional factor to be weighed in evaluating the defendants' overall intent. *Oliver v. Kalamazoo Board of Education*, 368 F. *Supp.* 143 (W. D. Mich. 1973).

I. BACKGROUND

The defendant School District of Omaha has within its boundaries the majority of the City of Omaha, Nebraska, as well as a part of Sarpy County, Nebraska. A portion of Omaha in the southwest sector of the City is served by School District 66. The schools operated by the defendants, however, are commonly referred to as the Omaha Public Schools. United States census data show that in 1940 there were 12,015 black citizens in Omaha, comprising 5.3 per cent of the population. By 1950 the number was 16,311, or 6.5 per cent of the total. In 1960 it was 25,155, or 8.3 per cent, and in 1970, it was 34,431, or 9.9 per cent. By way of comparison, the percentage of black students enrolled in the Omaha Public Schools has increased from 6.6 per cent in 1940 to 9.4 per cent in 1950, to 14.2 per cent in 1960, to 18.6 per cent in 1970, and to 19.8 per cent in 1973-74.

During the 1950's, black persons in Omaha resided generally in an area known as the Near North Side, bounded roughly by Cuming Street on the south, Wirt Street on the north, 33rd Street on the west, and Florence Boulevard on the east. Census tract information is available which was compiled by the School District of Omaha as required by state law and which shows the concentration of black school age children, ages five through twenty, throughout the City on a scale of less than one per cent, one to twenty-five per cent, twenty-six to fifty per cent, fifty-one to seventy-five per cent, and seventy-six to one-hundred per cent. This information shows that in 1952-53, the only elementary attendance zone with as high as seventy-six to one-hundred per cent black school age children was the Long school zone. This zone sits almost directly in the center of the Near North Side. The only zones with fifty-one to seventy-five per cent black school age children were Lake, immediately to the northeast of Long, and Howard Kennedy, immediately to the northwest of Long. The only zone with twenty-six to fifty per cent black school age children was Kellom, immediately to the southeast of Long. Various other zones had one to twenty-five per cent black school age children, and they were scattered near the schools above mentioned and in the eastern and southeastern portion of the School District.

By 1959-60, there were seventy-six to one hundred per cent residential concentrations of black school age children in the Long, Howard Kennedy and Lothrop (immediately north of Lake) zones. Fifty-one to seventy-five per cent concentration resided in the Lake and Druid Hill (immediately north of Kennedy and west of Lothrop zones). The only twenty-six to fifty per cent concentration was again in Kellom. One to twenty-five per cent concentrations resided on the north and southwest fringes of the above-mentioned schools, in two isolated schools in the central portion of the District, and in a cluster of seven zones in the southeastern portion of the District.

By 1969-70, there were seventy-six to one hundred per cent residential concentrations of black school age children in the Long, Kennedy, Lake, Kellom, Lothrop and Druid Hill zones. Fifty-one to seventy-five per cent concentrations resided in the Monmouth Park (immediately to the northwest of Druid Hill), Saratoga (immediately to the north of Lothrop) and Franklin (immediately to the west of Long and Kennedy) zones. Twenty-six to fifty per cent concentrations resided in the Clifton Hill (immediately to the west of Franklin, Kennedy and Druid Hill), Central Park (immediately to the west of Monmouth Park) and Indian Hill (in the southeastern portion of the District) zones. Schools with one to twenty-five per cent concentrations generally bordered the abovementioned zones. Thus, by 1969-70, the last year for which these census tracts are in evidence, there can be seen a definite increase in the concentration of black school age children residing in the northern and eastern portions of the District, including the area referred to in the 1950's as the Near North Side, and a gradual increase in concentration in the zones to the west and north of the Near North Side. Also, there was by 1969-70 a small but apparently growing concentration of black children residing in the southeastern portion of the District.

II. ELEMENTARY SCHOOLS

For the school year 1973-74, there were seventy-nine elementary schools within the defendant School District, serving 33,495 students, of whom 6,876 (or approximately twenty per cent) were black. The elementary schools are the heart of the defendants' neighborhood school policy. Geographic boundaries are drawn for each school and the students living within the boundaries of a certain school are expected to attend that school.

The plaintiff and intervenors allege that in the elementary schools the defendants have departed from the neighborhood school policy in two ways and that these departures have been made with segregative intent. They are:

(1) The adding of capacity to relieve overcrowding

(2) The alteration of attendance zones.

(1) THE ADDING OF CAPACITY

There have been periods in the operation of the Omaha Public School System in which many of the elementary schools have enrolled numbers of students in excess of the published capacities for those schools. The School District's response to these overcrowding problems has generally been either to increase the capacity at the existing schools by use of temporary classrooms, or to construct new schools (the discussion of which is found at page 42, *infra.*). The earliest use of temporary classrooms by the defendant School District which is reflected in the record is in the early 1950's, and the evidence shows an increasing use of temporary classrooms throughout the 1960's and to the present time. Currently there are substantial numbers of temporary classrooms in schools with high black enrollments. However, there are also substantial numbers of such units in the far northern and western portions of the School District, in predominantly white schools located in predominantly white residential areas.

As discussed earlier in this opinion, there has been a general shifting of the concentration of the black student population within the School District in the northerly and westerly directions from the area once known as the Near North Side. There has been no showing that the placement of temporary classrooms has corresponded to this shifting, and there is no support in the record for a conclusion that these units have been placed in certain schools for the purpose of containing black students in those schools.

The plaintiff and intervenors complain specifically of the placement of temporary classrooms at Franklin and Clifton Hill schools. These schools have adjacent attendance zones and are located in the north-central portion of the School District. The racial compositions of both schools have followed a parallel course: predominantly white throughout the 1950's;[1] majority white in the mid-1960's; majority black in the mid-late 1960's; currently predominantly black. Thus, the enrollments at these schools reflect the black residential shift mentioned earlier. Also, both of these schools began experiencing increasing enrollments in the early to mid-1960's. The School District's response was to supply these buildings with temporary classrooms. By 1971-72, Franklin was over-capacity by 317 pupils and had thirteen temporary classrooms, while Clifton Hill was 255 pupils over capacity and had twelve temporary classrooms. The schools adjacent to Franklin on the south, southwest and west, are Yates, Saunders and Walnut Hill, respectively, which have always been predominantly white and which through 1971-72, had generally been under the published capacity. The schools adjacent to Clifton Hill on the west and northwest are Rose Hill and Fontenelle, respectively, which through 1971-72 were predominantly white and under capacity.

The plaintiff and intervenors argue that substantial reductions in racial imbalance at all the above-mentioned schools would have resulted if the School District had restructed the attendance requirements for these schools (*e. g.*, by redrawing boundaries or by reassigning grades of students), and that the failure of the School District to do so is evidence of segregative intent.

The Court agrees that some restructuring was possible which would have increased a better racial balance at all these schools, and that by continued restructuring over the years, a substantial degree of integration could have been maintained. But it is also clear that at the time in question, this restructuring of enrollments, whether by the altering of attendance zones or by the shifting of grades between schools, simply was not a method used by the School District to alleviate overcrowding. There is some evidence of such practices in the 1950's and early 1960's, but the amount of this restructuring was, even then, not substantial. By the mid-1960's, it is clear that the School District emphasized use of temporary classrooms as the primary measure for dealing with increased enrollments.

Further, the Court notes that the increase of capacity by use of temporary classrooms had an integrative effect for some schools. For example, from 1964-65 through 1972-73, the black enrollment at Miller Park increased from seven to 245 (1.1 per cent to 40.5 per cent) and the number of temporary classrooms increased from zero to ten. From 1967-68 through 1972-73, the black enrollment at Belvedere increased from 23 to 221 (2.5 per cent to 24.7 per cent) and the number of temporary classrooms grew from zero to six. From 1962-63 through 1972-73, the black enrollment at Central Park grew from three to 348 (.4 per cent to 46.9 per cent) and the number of temporary classrooms grew from three to ten.

This evidence does not, of course, prove that the School District used temporary classrooms with an integrative intent. But it is some evidence that the Board acted with no racial intent at all, and this is precisely the Court's conclusion. The evidence presented simply shows that use of temporary classrooms was the School District's choice for dealing with the overcrowding; that there was no pattern or design of placement of these classrooms on a racially discriminatory basis; and that, therefore, any segregative effects of the use of temporary classrooms were not intentionally caused or maintained by the defendants.

(2) ALTERATION OF ATTENDANCE ZONES

As mentioned previously, changes in elementary attendance boundaries have been infrequent in the Omaha Public Schools. There are two such changes, however, which the plaintiff and intervenors allege had a segrega-

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[1] Throughout this litigation the parties have used the term "predominantly" to refer to racial compositions in excess of sixty-five per cent.

tive effect and which were made by the School District to achieve that effect.

The first of these concerns Druid Hill and Monmouth Park Schools. Between 1957-58 and 1958-59, a portion of land just north and west of the Belt Line Railway was removed from the Druid Hill (majority black) zone and added to the Monmouth Park (predominantly white) zone. There is no way of determining the number of students involved in this transfer, nor their race, although an inference is permissible from other exhibits and evidence that this residential area was largely white. In any event, the adjustment is plausibly explained by the School District, and the Court finds that this explanation is devoid of any segregative intent: in the spring of 1958 a Druid Hill student crossing the Belt Line Railroad tracks going home for lunch was nearly struck by a train. Thereafter, the portion of the Druid Hill zone across the tracks and nearest to Monmouth Park School was assigned to that school until 1965, when a cafeteria was installed in Druid Hill.

The second boundary adjustment also occurred between 1957-58 and 1958-59, when a primarily white residential section of the Webster (majority white) zone was removed from that school and added to the adjacent Yates (predominantly white) zone. In 1959-60, the Webster seventh and eighth grades were removed from that school and assigned to Technical Junior High, which was rapidly becoming majority black. The seventh and eighth grades were retained at Yates. The plaintiff and intervenors allege that this boundary change between 1957-58 and 1958-59 thus permitted white seventh and eighth grade students to avoid attendance at Technical Junior High. The facts, however, show no sudden increase in the Yates seventh and Eighth grade enrollment. The Yates grade to grade progression for the 1959-60 seventh and eighth grade students shows a relatively constant pattern—1956-57 fourth and fifth grades: 45 and 33; 1957-58 fifth and sixth grades: 44 and 36; 1958-59 sixth and seventh grades: 44 and 43; 1959-60 seventh and eighth grades: 44 and 38. Thus, the Court concludes that few, if any, seventh and eighth grade students were thus excluded from Technical Junior High and that there was no segregative effect to this boundary change.

In conclusion, the Court finds that these two instances of boundary changes were not prompted by any segregative intent of the School District, and with regard to the Yates-Webster situation, the Court finds that there was not even any segregative effect.

III. JUNIOR HIGH SCHOOLS

The plaintiff and intervenors allege that the operation of the junior high system, especially as it concerns Technical Junior High and Horace Mann Junior High evidences segregative intent on the part of the Omaha School District. They further allege that this segregative intent can be determined in three ways:

(1) Through the initial placement of the junior highs and the establishment of elementary feeder schools for them;

(2) Through the manner in which the elementary programs were converted from K-8 through K-6, including the retention of some schools as K-8;

(3) Through the establishment of optional attendance zones for some seventh and eighth grade students.[2]

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[2] The plaintiff and intervenors also allege that in two instances the defendants deliberately formulated student assignment policies so as to avoid sending white students to Technical Junior High. The first of these concerns the defendants' alleged practice of sending white ninth grade students from the overcrowded Lewis and Clark Junior High past the Technical facility to Central from 1960-61 through 1962-63. The second concerns the failure of the defendants to provide Technical High as an option for ninth grade students new to the City or entering the public schools from parochial schools, both of which dealt with certain limited areas of the School District.

(Continued on following page)

The plaintiff and intervenors argue that by these means the School District has concentrated black students in Technical Junior High and Horace Mann Junior High and has permitted white students who live near these schools to avoid mandatory assignment to them. The School District denies the existence of segregative intent, reaffirms its application of a racially neutral neighborhood school policy, and offers explanations for deviations therefrom.

(1) INITIAL PLACEMENT AND FEEDER PATTERNS

Prior to approximately 1950, the Omaha School District provided instruction in two school settings, one for grades K through 8, and another for grades 9 through 12. The junior high system, whereby grades 7 through 9 are offered and housed in a separate setting, was proposed to the Omaha Public School System as early as 1917, although no action on this proposal was taken at that time. The idea was revived in the 1951 Study of Plant Facilities and Requirements published by the Omaha Board of Education. Nine junior highs were proposed—one for each of nine geographical portions of the District. Some were to be housed in buildings to be constructed, some in converted elementary facilities, and one (Technical Junior High) in a portion of a senior high school building.

For the areas in which substantial concentrations of black school age children later came to reside, two junior highs were proposed. The first of these was Technical Junior High, located on the site of Technical Senior High at 33rd and Cuming Streets, which was on the southwestern border of the area known as the Near North Side. The designated feeder elementary schools for Technical Junior High and their racial enrollments for the 1951-52 school year as compared to the 1973-74 school year are as follows:

	1951-52		1973-74	
	White	Black	White	Black
Central Grade	431	5	107	21
Kellom	365	356	40	470
Lake	254	319	38	141
Long[3]	0	433	32	355
Webster	223	122	Closed after '68-69	
Yates	367	0	196	50
TOTAL	1,640	1,235	413	1,037

The second of these junior highs was to be made by removing the elementary students from Druid Hill School and converting it to a junior high. The feeder schools and their racial enrollments for the 1951-52 school year as compared to the 1973-74 school year are as follows:

(Continued from previous page)

The evidence on these points is far from clear, and does not establish that these were indeed the defendants' practices. Moreover, there is no basis for determining the number of students, if any, affected by these alleged policies. The Court, therefore, does not consider them evidence of segregative intent.

[3] Long has been replaced by Conestoga.

	1951-52		1973-74	
	White	Black	White	Black
Central Park	566	0	307	351
Druid Hill	260	55	35	308
Monmouth Park	400	0	98	353
Howard Kennedy	4	346	3	622
Lothrop	511	258	11	627
Saratoga	587	0	77	522
TOTAL	2,328	659	531	2,783

By 1955, none of these junior highs, with the exception of Technical Junior High on a limited basis, were in operation. The 1955 Study of School Enrollment and Plant Facilities published by the Omaha School Board proposed a new system of eleven junior highs. For the areas which then and later had substantial concentrations of black school age children, three junior highs were proposed. The first was again Technical Junior High, which had already received the seventh and eighth grades from Kellom and Central Grade Schools. The proposed feeder schools for Technical Junior High and their racial enrollments for 1955-56 as compared to 1973-74 are as follows:

	1955-56		1973-74	
	White	Black	White	Black
Franklin	683	19	80	554
Kellom	376	481	40	470
Webster	227	118	Closed after '68-69	
TOTAL	1,286	618	120	1,024

In place of the converted Druid Hill Junior High of the 1951 study, the 1955 study proposed a Paxton Boulevard junior high. The proposed feeder schools and their racial enrollments for 1955-56 as compared with 1973-74 are:

	1955-56		1973-74	
	White	Black	White	Black
Central Park	680	0	307	351
Druid Hill	241	175	35	308
Monmouth Park	537	0	98	353
Saratoga	649	3	77	522
TOTAL	2,107	178	517	1,534

In addition to these, the 1955 Study also proposed a Near North Side junior high, to be erected on the northern edge of Adams Park, although the Board realized acquisition of park property would be difficult. The feeder schools for this junior high and their racial enrollments for 1955-56 as compared with 1973-74 are:

	1955-56		1973-74	
	White	Black	White	Black
Howard Kennedy	41	726	3	622
Lake	312	508	38	141
Long	34	480	32	355
				(Conestoga)
Lothrop	382	603	11	627
TOTAL	769	2,317	84	1,745

During the years 1956-62, a number of junior highs were opened in the Omaha School District. Neither the Paxton Boulevard junior high nor the Near North Side junior high were among them. However, a new junior high was constructed near Twentieth and Pratt Streets, approximately five blocks north of the Near North Side. This School, Horace Mann Junior High, opened in the 1959-60 school year. The racial enrollment at Mann was 177 white and 443 black in that year and has been predominantly black ever since. In 1958-59, McMillan Junior High, also in a new building, was opened at 38th and Redick Streets, to the north and west of Mann. It was completely white when opened but the percentage of blacks has steadily increased and in 1973-74, black students comprised thirty-six per cent of the enrollment.

With respect to Technical Junior High, the foregoing paragraphs describe the planned feeder schools. However, these plans never materialized. The actual evolution of the Technical Junior High[4] zone consisted of the piece-meal designation of various elementary schools to Technical Junior High as follows:

	Year 7th & 8th Grades Assigned to Technical Junior High	Enrollment at This School for that Year		Enrollment at Technical Junior High for that Year	
		White	Black	White	Black
Kellom	1950-51	402	350	66	76
Central Grade	1951-52	431	5	162	135
Long	1955-56	34	480	171	162
Franklin	1957-58	618	18	274	273
Webster	1959-60	143	111	363	323

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[4] After the School District converted to the K-6-3-3 system, the other junior highs eventually housed grades 7-9, and the senior highs grades 10-12. At Tech, however, the junior high has always housed only grades 7-8, while the senior high housed grades 9-12. Central, North and South High Schools also house ninth grade students.

On a geographical basis, these five schools were the closest to Technical Junior High with the exception of Yates and the possible exceptions of Saunders and Walnut Hill, all of which were predominantly white from 1950 to the present.

After 1959-60, enrollment at Technical Junior High was amplified only by its assignment as an optional junior high for certain elementary schools and the designation of Yates as a feeder school in 1970-71. In 1960-61 and 1961-62, Technical Junior High was majority white. In 1962-63, it turned majority black and from that point on, the percentage of black students has risen steadily, reaching over ninety-five per cent in the late 1960's. The junior high program at Technical was closed after the 1971-72 school year.

With the exceptions described below, students are and have been assigned to junior high schools according to the neighborhood school policy. Geographic boundaries exist for each junior high which generally correspond to the boundaries of designated elementary schools near that junior high. Thus these elementary schools become feeders for the junior highs. In some cases the junior high boundary may not correspond exactly to the elementary school boundary, and two students who attended the same elementary school may be assigned to different junior highs.

(2) CONVERSION FROM K-8 TO K-6

Most elementary schools lost their seventh and eighth grades to junior high schools during the 1956-62 junior high construction. As of the 1962-63 school year, there were sixteen elementary schools which were still housing the seventh and eighth grades. These schools were located across the entire middle and eastern portion of the School District, in both the north and south parts of the City, and in both the black and white residential areas. By the 1964-65 school year, only seven of these schools remained K-8. Four of these seven, Jackson, Mason, Walnut Hill and Yates, were located such that the closest junior high was Technical Junior High. Two of the seven, Pershing and Sherman, were located such that the closest junior high was Mann. For the school years 1964-65 through 1971-72 all six of these elementary schools had predominantly white enrollments, while Technical Junior High and Mann were both predominantly black.[5]

Aside from certain limited testimony concerning Yates School,[6] there is no direct evidence concerning the intent of the defendant School District in failing to convert any of the elementary schools from K-8 to K-6.

For the years 1964-65, through 1971-72, the number of seventh and eighth grade students retained at these six elementary schools is as follows:[7]

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[5] The seventh elementary school, Ashland Park, had a predominantly white enrollment but was located closer to junior highs other than Technical or Mann. It was converted to K-6 in 1965-66.

[6] In early 1969, officials of the School District proposed removing the seventh and eighth grades from Yates and assigning these students to Technical Junior High, which was approximately five blocks away. In 1968-69 Yates enrolled 54 seventh and eighth grade students and its total enrollment was 317 white and 7 black, while the enrollment at Technical Junior High was 25 white and 616 black.

Parents of Yates students attended a meeting of the Board of Education in the Spring of 1969 and expressed opposition to having their children attend junior high in a building that housed a senior high. The Board of Education permitted a one-year delay, and the Yates seventh and eighth grades were assigned to Technical Junior High beginning in 1970-71.

[7] The racial composition of these seventh and eighth grades is unknown, although presumably it mirrors that of the school as a whole. During these years, each of the elementary schools was predominantly white in total enrollment.

SCHOOL	1964-65	1965-66	1966-67	1967-68	1968-69	1969-70	1970-71	1971-72
Mason	90	Converted to K-6						
Jackson	63	85	64	66	63	66	62	70
Walnut Hill	104	113	111	Converted to K-6				
Yates	58	70	70	52	54	34	Converted to K-6	
Pershing	110	103	87	70	55	49	52	50
Sherman	125	114	128	119	116	111	119	123

Of these six schools, only Sherman and Pershing at any time had enrollments in excess of their building capacity, and never to a serious degree. On the other hand, Technical Junior High and Mann consistently had enrollments somewhat below published capacity:

SCHOOL	1964-65		1965-66		1966-67		1967-68		1968-69		1969-70		1970-71		1971-72	
	E	C	E	C	E	C	E	C	E	C	E	C	E	C	E	C
Technical Junior High	653	795	630	795	667	795	637	795	641	795	641	795	598	795	606	795
Mann	1000	1380	1051	1380	986	1380	880	1380	819	1380	827	1380	832	1380	882	1307

With respect to the four elementary schools closer to Technical Junior High the only zone from which transportation to Technical would be difficult is Mason, where, due to the commercial and highway development separating these areas, transportation would have posed a serious problem.

With respect to the two elementary schools closer to Mann, the situation is somewhat different. The Pershing and Sherman zones are relatively isolated from the rest of the School District in the northeastern corner thereof, in areas sparsely populated and containing increasing commercial and industrial development. The driving distances between the Sherman and Mann buildings is 1.7 miles, but the distance is greater for most of the Sherman zone. The driving distance between the Pershing and Mann buildings is 3.1 miles.

The isolation of the Pershing and Sherman zones was recognized by the School District in the 1955 Study of School Enrollment and Plant Facilities, in which it was recommended that a separate, smaller-than-usual junior high facility be built at Sherman School to accommodate both Sherman seventh and eighth grade students and those from the expected annexation of East Omaha (served by Pershing School). This annexation did occur and the smaller junior high recommendation was made again in 1962, but an expected population increase in the area never materialized and this junior high was never built. Pershing and Sherman are currently and always have been K-8 schools, although for two years, 1960-61 and 1961-62, students from both schools had the option of attending Mann (predominantly black), McMillan (predominantly white), or staying at their previous elementary school. The evidence does not permit a conclusion as to how the options were exercised, if at all.

(3) OPTIONAL ATTENDANCE ZONES

The plaintiff and intervenors are also concerned with the School District's practice of creating optional attendance zones for seventh and eighth grade students from certain elementary schools near Technical Junior High. The schools with these options were Mason, Saunders and Walnut Hill. The following are relevant statistics for the time period involved:

School	Driving Distance to Optional Junior Highs	Racial Enrollment in Year Option Created	
		White	Black
Saunders	1.0 miles to Technical	1964-65	
	2.2 miles to Norris		
	2.5 miles to Lewis & Clark	178	0
Mason	1.9 miles to Technical	1965-66	
	2.7 miles to Norris		
	2.3 miles to Bancroft	447	12
Walnut Hill	1.3 miles to Technical	1967-68	
	3.3 miles to Norris		
	2.5 miles to Lewis & Clark	432	8

Technical Junior High

	White	Black	Total	Stated Capacity
1964-65	254	399	653	795
1965-66	223	407	630	795
1966-67	160	507	667	795
1967-68	69	568	637	795

Bancroft, Lewis and Clark and Norris Junior High Schools were all predominantly white during this time period.

The above information gives the statistical background concerning the optional attendance zones; information concerning the actual exercise of these options is available for the 1971-72 school year only and is as follows:

Children residing in the Walnut Hill zone:

		Racial Composition	
		White	Black
To Technical Junior High	— 3	48	551
To Lewis and Clark	—90	1,205	21
To Norris	— 5	1,407	10

Children residing in the Saunders zone:

To Technical Junior High	— 1		
To Lewis and Clark	—21		
To Norris	—23		

Children residing in Mason zone:

To Technical Junior High	— 1		
To Norris	—25		
To Bancroft	Not Available	473	2

At the end of the 1971-72 school year, Technical Junior High was closed. The Saunders and Walnut Hill options were continued to Lewis and Clark and Norris, while the seventh and eighth grade students from Mason were assigned either to Bancroft or Norris, depending upon their street address.

In addition to these three optional attendance zones, there have been nine other elementary schools throughout the School District which either currently or in the past have had options concerning junior high attendance. With regard to eight of these nine schools, Connestoga, Harrison, Irvington, Pershing, Ponca, Rose Hill, Sherman and Washington, the evidence indicates that exercise of these options to the various junior high schools involved had no significant segregative or integrative effect. The ninth school was predominantly black (Druid Hill, 1966-67: 25 white, 568 black). In 1967-68 seventh and eighth graders in a portion of the Druid Hill zone were given options to attend predominantly black Mann (1966-67: 23 white and 963 black) or predominantly white McMillan (1966-67: 1303 white and 119 black). Mann was approximately one mile and McMillan approximately two and a half miles from the center of the optional zone. No precise records are in evidence concerning the exercise of this option, but for 1967-68, the total enrollment at McMillan showed an increase of 42 black students and a decrease of 44 white students, while at Mann there was a decrease of 105 black students and 1 white student. Thus, the option, for the year 1967-68, had some integrative effect. This option continues to the present.

CONCLUSIONS

The foregoing constitute the Court's findings of fact concerning the junior high system in the Omaha School District. From these findings the Court is able to draw certain conclusions. The first such conclusion is that there was no segregative intent on the part of the defendant School District in the establishment of the junior high system or in its assignment of feeder schools for the various junior highs. The evidence shows that the District's proposals for the various junior highs were consistently made on a geographical basis and that the race of the students expected to attend these schools was never a consideration. Of the junior highs which were ultimately built and operated, there were at times two—Technical and Mann—and there is currently one—Mann—which have enrolled a predominantly black student body. However, there appears in the record no evidence to indicate desire or design by the School District that this should occur. In both the 1951 and 1955 Studies, the combined enrollments of the feeder schools for the junior highs which ultimately became Technical and Mann were, as of those years, predominantly white. The only proposed junior high with feeder schools enrolling even a combined majority of black students was the 1955 Near North Side junior high, the erection of which was recognized then to be improbable, and which was, in fact, never built.

The evidence shows a constant increase in the concentration of black school age children in the areas to the north and west of what was once known as the Near North Side, and this increase is reflected in the racial enrollment of the various feeder schools, and consequently in the junior highs.

With respect to the conversion of K-8 schools to the K-6 system, the Court finds that this policy in itself was racially neutral and was not indicative of any segregative intent. The policy was not totally applied to all schools at the same time and certain exceptions were made which deviated from the conventional neighborhood school basis and which plaintiff and intervenors argue demonstrate a segregative intent. However, as stated at the outset, the burden of proof here is upon plaintiff and intervenors to show an intentionally segregative policy practiced in a meaningful or significant portion of the school system. Only then does it become incumbent upon the defendants to prove that their actions or non-actions were not motivated by segregative intent. The Court is not of the opinion that plaintiff and intervenors have met this burden in connection with this particular policy. First of all, the record shows that Mason converted to K-6 by 1965-66, Walnut Hill by 1967-68, and Yates by 1970-71. The record is unclear and undeveloped as to the status of Jackson at this time, although there is some evidence to indicate that the K-8 policy is still in existence at that school. The record further shows that Yates was permitted a one-year delay from 1969-70 to 1970-71 for conversion because of a request from the parents of the Yates students based upon the opposition to the children attending a junior high (Technical) which was housed with the senior high. There is some evidence as to the personal opinions of a school board member and a school board employee as to the reason for the parents' request having to do with racial factors, but the Court considers this testimony to have little, if any, probative value and it is not persuasive of the plaintiff and intervenors' contentions. Furthermore, if this particular policy was creating or continuing a racial imbalance, it was remedied by 1970-71[8] which would have heavily discounted an "intentionally segregative policy practiced in a meaningful or significant portion of the school system." Also, heavily discounting such segregative intent is the fact that a portion of an adjacent zone (Webster) was transferred to the Yates zone in 1969 which thereby increased the black enrollment at Yates from two per cent to thirteen per cent.

Furthermore, the Court concludes that the geographic isolation of the Sherman and Pershing schools was and is a sufficient reason for the School District to permit the seventh and eighth grade students to remain in those buildings and that this decision is consistent with the District's neighborhood school policy. The Court further concludes that the necessary segregative intent has not been demonstrated by the plaintiff and intervenors with reference to the seventh and eighth grades at Jackson, Mason, Walnut Hill and Yates, and that the reasons advanced for those respective retentions of K-8 policy until 1970-71 were not motivated by or indicative of a segregative intent on the part of the defendants practiced in a meaningful or significant portion of the school system.

Considering next the optional attendance zones, the Court finds that the maintenance of such a system presented a necessary and reasonable deviation from the neighborhood school policy. Historically, and most frequently during the 1960's, optional zones were frequently used when the junior high schools came into being and were in existence throughout the District. The optional zone from Walnut Hill in 1967-68 was created when enrollments at Monroe Junior High made it impossible to assign Walnut Hill as a feeder school to that particular junior high school, which would have been the most desirable arrangement inasmuch as Walnut Hill fell within the Benson High attendance area, Benson High and Monroe occupying the same site. In the same year that the Walnut Hill optional zone was created, seventh and eighth grade students in a portion of the Druid Hill zone, which was predominantly black, were given the option of attending Mann Junior High (predominantly black) or McMillan Junior High (predominantly white), even though McMillan was approximately one and a half miles farther away from this area than Mann. Insofar as the Mason optional zone is concerned, this was created in 1965 when Bancroft Junior High first opened in order to give the seventh and eighth graders from that area an alternative in transversing a commercial area and extensive interstate highway construction in order to reach Technical Junior High. Saunders Elementary School had never been proposed as a feeder school for Technical Junior High, either in 1951 or 1955. In these years there was a proposal that a portion or all of Saunders be assigned to the Dundee or Western Avenue Junior High respectively. The Dundee and Western Avenue Junior Highs ultimately merged in what was to be known as Lewis and Clark which, because of the availability of open land space, was located at the westernmost part of the zone which it was to serve. Saunders, therefore, was made an optional zone to Lewis and Clark or Technical or Norris in 1964-65 when the record shows that enrollments at Technical Junior High were up and enrollments at Lewis and Clark were down. From this evidence, the Court concludes that in these three instances, the School District deviated from the neighborhood school policy for sound, administrative reasons, and its judgment was not based upon racial reasons or a segregative intent. In this connection, it should further be noted that a significant measure of racial balance was achieved so far as Druid Hill was concerned because of this optional zone policy which, again, would discount overall an intentionally segregative policy. It is here noteworthy to point out the observation made by the Court in the case of *Higgins v. Board of Education, Grand Rapids, Michigan,* No. CA 6386 (W. D. Mich., Filed July 18, 1973), Slip Opinion at 34-35, which is applicable to the instant case:

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[8] The only possible exception is Jackson which in and of itself would fall short of demonstrating a practice involving a meaningful or significant portion of the school system.

> To anyone endeavoring with objectivity to consider the contentions of the parties, the most singular impression is of the unending dilemmas which face the school officials of a large urban system. It is altogether too easy for one, desiring in advance a particular result, to assign to any Board action that motive and that effect which most likely will support the personal predilection. Particularly difficult is the necessary task of examining Board action in the light of the circumstances as they existed at a given time, of alternatives available, of knowledge of what the future would or would not bring to the system, and of viewing each action or inaction in the light of its impact on the whole.

IV. HIGH SCHOOLS

At the present time there are eight senior high schools in the Omaha Public School System. Three of these (Bryan, Burke and Northwest) have been opened within the past seven years and are located in the far south, western and northwestern portions of the School District, respectively. They were built in predominantly white residential areas, and have always had predominantly white enrollments. The remaining five schools, Benson, Central, North, South and Technical, have all been in operation for at least forty years. Three of these five have specified attendance zones—Benson in the mid-northwestern portion of the District; North in the northeastern portion of the District; and South in the southeastern portion of the District. Central and Technical share the same attendance zone in approximately the middle and eastern portion of the District. Technical is north and west of Central and is located approximately at the southern boundary of the Near North Side area which area comprises the largest precentage of black population in the City. In addition to serving this mutual zone, Central and Technical are and have always been open enrollment schools, which means that a student from any attendance zone may choose to attend Central or Technical rather than the high school serving his or her zone. These are the only open enrollment schools.[9]

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[9] At one time South was also an open enrollment school, but the evidence does not show that this was ever a significant factor in determining racial enrollment at any Omaha High Schools.

From 1936 to 1945 Technical High had the largest student body in the School District, enrolling over 3,000 students annually, with a peak of 3,771 in 1940-41. Technical consistently enrolled the largest number of black students during this time period, with a high of 320, or approximately nine per cent of the student body, in 1941-42.

Around 1945, Technical began experiencing a steady decline in total enrollment to the point that for 1973-74 Technical enrolled only 710 students. At the same time there has been a consistent increase in the percentage of black students at Technical, and in 1973-74, blacks comprised 96 per cent of the student body.

This development has not been paralleled at any other high school. Figures introduced in evidence disclose the following concerning the five schools which have served the School District throughout this time:

	BENSON		CENTRAL		NORTH		SOUTH		TECHNICAL	
	Total	Per Cent Black	Total	Per Cent Black	Total	Per Cent Black	Total	Per Cent Black	Total	Per Cent Black
1936-37	1,507	0[10]	2,013	8	2,001	2	2,803	2	2,916	6
1941-42	1,162	0	2,113	9	1,740	1	2,915	2	3,365	9
1946-47	1,334	0	1,699	12	1,515	1	2,373	2	2,418	10
1951-52	1,186	0	1,455	11	1,531	1	2,183	3	1,879	18
1956-57	1,352	0	1,882	13	1,778	2	2,477	3	1,727	26
1961-62	1,985	0	1,758	13	1,794	3	2,619	2	1,537	44
1966-67	2,096	1	2,088	18	2,165	18	2,521	2	1,453	69
1971-72	1,894	7	2,078	26	2,178	26	2,609	2	1,048	91
1973-74	1,637	14	2,075	32	1,890	36	2,444	3	710	96

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[10] Percentages are rounded to the nearest whole number.

In the 1950's, published reports of the School District listed Technical as thirty per cent below capacity, Central as filled to capacity, and the three other high schools as overcrowded. In the late 1950's and early 1960's additions at Benson, North and South relieved the overcrowding somewhat at those schools. However, South High experienced severe overcrowding from 1961-62 to 1964-65 and Benson was seriously overcrowded from 1962-63 through 1971-72. Yet, from 1959-60 through 1971-72, Technical, even though it housed Technical Junior High in a wing of the total facility, had excess capacity of from 680 to 1,500 students. This situation as it developed at Technical Senior High was known to the administration of the Omaha Public Schools. Mr. Carl Palmquist, the principal at Technical during the 1950's and 1960's, repeatedly notified the Superintendent of Schools and his staff orally and in writing that Technical was in danger of becoming an all-black school.

It is clear that the success of the open school and mutual zone policies at Technical, insofar as the retention of a sufficiently high enrollment is concerned, were dependent upon the attractiveness of Technical to students throughout the District. It is also clear that in the last twenty-five years, fewer and fewer white students have been attracted to Tech. The plaintiff and intervenors allege that a substantial contributing cause to this situation has been the School District's intentional deterioration of the quality of education offered at Technical. The Court disagrees and finds that the operation of Technical does not disclose segregative intent on the part of the defendants and to the contrary, shows a determination on the part of defendants to upgrade both the physical plant and the quality of education at this school.

Furthermore, as far as Tech's majority black status is concerned, the Court reiterates that racial balance is not required under the Constitution and there can be and are many instances were one-race schools within a District are plainly permissible under the law. It is only where the imbalance is caused by a segregative intent on the part of the School Board and where the imbalance thereby reaches the proportion of constitutional violation that the Court may supplant its judgment and policy for that of the School District. As stated in *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), at pages 25 and 16:

> The record in this case reveals the familiar phenomenon that in metropolitan areas minority groups are often found concentrated in one part of the city. In some circumstances certain schools may remain all or largely of one race until new schools can be provided or neighborhood patterns change. Schools all or predominantly of one race in a district of mixed population will require close scrutiny to determine that school assignments are not part of state-enforced segregation.
>
> In light of the above, it should be clear that the existence of some small number of one-race or virtually one-race schools within a district is not in and of itself the mark of a system that still practices segregation by law.
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> • • •
>
> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion of the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.

See also, *Spencer v. Kugler,* 326 F. Supp. 1235 (D. N. J. 1971), *aff'd.* 404 U. S. 1027 (1972), where the Court stated:

> "The schools . . . are racially imbalanced by reason of N. J. S. 18A:8-1 to 42 and N. J. S 18A:38-1 to 24, which sets school district boundaries thereby rendering racial balance mathematically impossible in many districts, thus providing unequal educational opportunities. The State has taken no steps to achieve racial balance by reason of the mathematical composition of the geographical area which comprises the school district, has not attempted to redraw school district lines to achieve racial balance, has not provided funds for compensatory education to overcome adverse educational effects of racial imbalance." *Id.* at 1237.
>
> Plaintiff's substantive claim rests wholly on the assertion that there is an affirmative constitutional duty to achieve racial balance among the several districts of a state system of public schools; and that a failure to do so is in violation of Fourteenth Amendment rights. *Id.* at 1238.
>
> The Court in Swann draws a critical distinction between those states which have a history of dual school systems and a separation of the races which has continued through "freedom-of-choice" and "geographical zoning" plans which create the illusion of conforming to law, and those wherein so-called "de-facto" segregation results from housing patterns and conventional drawing of school district zones. *Id.* at 1242.
>
> A continuing trend toward racial imbalance caused by housing patterns within the various school districts is not susceptible to federal judicial intervention. The New Jersey Legislature has by intent maintained a unitary system of public education, albeit that system has degenerated to extreme racial imbalance in some school districts; nevertheless, the statutes in question as they are presently constituted are constitutional. *Id.* at 1243.

The evidence discloses that from at least the late 1930's through the 1950's, Technical offered a comprehensive curriculum, with courses in both college preparatory and vocational areas. Tech had the most advanced vocational program in the School District, and a substantial portion of the students attending Technical did so because of this program. Extensive vocational instruction was also offered at South.

In the early 1960's, the interest of high school students in vocational education diminished District-wide, and greater importance was placed on college preparation. Also, in the 1960's officials at Tech became aware that black students (Technical turned majority black in 1963-64) were having difficulty finding employment in certain skilled areas. As a result of these two factors, Tech dropped its instruction in certain vocational areas, *e. g.*, electronics and instrumentation—and added programs in other vocational areas, such as auto mechanics and culinary arts, where job accessibility for blacks was greater. The interest of high school students in the vocational programs at Technical has continued to decline to the point that many areas of the school and much equipment are not currently in use. The Court does not find, however, that the potential for an excellent vocational educational program at Technical has in any way diminished. The equipment and facilities are present, are of high quality, and are equal to and in some areas superior to, those of any high school in the District. In the 1960's, the curriculum at Tech changed in other ways as well. Certain of the foreign languages (*e. g.*, French and German) were eliminated because of decreased student interest (although Spanish and Latin were retained). Also the orchestra was removed. On the other hand, programs such as R. O. T. C., guidance and health (for girls) and an audio-response English program were initiated.

Also, in the early 1960's, a program of what is known as "special education"—*i. e.*, classes geared particularly to students who have not progressed satisfactorily academically or who have learning disabilities—was instituted at Tech. Tech was the only high school which had

these classes for the first few years, and as many as two hundred students participated in this program in any one year. Eventually the other high schools initiated such classes, although the dates in which they did so are unknown. The plaintiff and intervenors argue that students from across the District who needed special education or who had histories of disciplinary problems in school were channeled into Tech, and that thus, the ability of the Tech students as a whole and the attractiveness as a high school were further reduced. There is not sufficient evidence to support this claim. To the contrary, the evidence discloses that the special education program at Technical was designed to serve the students already enrolled at that school, not students from other schools. Concerning disciplinary problem students, there is evidence that Tech received such students from other schools and transferred such students out of its own facility to other schools, and there is no evidence of the relative numbers of these students.

Prior to the start of the 1971-72 school year, Tech experienced what several witnesses have described as "disruptions" of an unspecified character and number. There is considerable evidence that many students at Technical at this time were dissatisfied with the content and structure of courses offered, the manner of instruction, the treatment of Technical by the central administration of the School District, and the physical plant at Technical. The state of the record does not permit findings as to the factual basis for this dissatisfaction. However, in response to the students' action, and in cooperation with various citizens' groups and an outside consulting firm, the School District made several changes at Tech for the school year 1971-72. The building itself was repaired and renovated; some faculty assignments were changed; and the curriculum was altered substantially. The evidence shows that the academic program at Tech from 1971-72 to the present has been basically individualized. The traditional time schedule of quarters, semesters, etc., has been discarded so that students progress at their own pace. Students may now take as much or as little of a course as they are able to handle at any one time, and the courses can be structured to fit the particular student's needs. Also Tech has considerable flexibility in its course offerings. Varied faculty backgrounds permit the devising and implementing of courses not formerly offered, as students' needs and interests require. There has also been an active student recruitment program at Technical, both for full and part-time students.

V. SPECIAL TRANSFER POLICY

A. Introduction

One of the methods by which a student may attend a school other than that in his zone of residence is by obtaining approval of the School District for a special transfer. The origin of the special transfer policy was explained in the Memorandum Opinion following the preliminary injunction hearing, 367 F. Supp. at 191. Initiated in 1964, the policy has five formal prerequisites for the granting of a special transfer:

(1) The achievement level of the pupil requesting a transfer must equal the average level of achievement of the pupils in the grade and school for which the transfer is being requested.

(2) The school to which the pupil is transferred cannot be an overcrowded school. Capacities of schools shall be determined by the staff and the Board of Education.

(3) The transportation of pupils is totally the responsibility of parents.

(4) The request must be a formal written request on an individual basis.

(5) Permission for a transfer shall not be granted until enrollments are ascertained.

In addition, in determining whether a transfer should be granted, the School District considers medical reasons, family hardships, and problem or learning situations where the School District feels a student may have a better chance of success in the transferee school.

The plaintiff and intervenors allege that the transfer policy has been operated in such a manner as to permit white students to avoid attendance at neighborhood schools which have substantial numbers of black students, and that this is evidence of the School District's segregative intent. The School District denies that transfers have ever been granted for racial considerations. Plaintiff and intervenors also assert that the transfer policy discriminates against black students because of the transportation and equal achievement requirements, but there has been no evidence introduced at trial which would support such allegations.

The transfer application form used by the School District has no space for indication of race, although correlation with other student records could give the School District this information. The application form does have a space for indication of the reason for transfer. A number of transfer applications have been introduced in evidence on which racial reasons were voluntarily offered by the parents. Some of these requests were granted and some were denied. Other applications have been introduced which list non-racial reasons, and again, some of these were granted and some denied. The Court finds the limited number of individual requests involved to be of little probative value in determining whether the policy as a whole was or was not administered with segregative intent.

Of greater probative value are the extensive analyses of the transfer policy's operation prepared by both the plaintiff and the defendants for the school years 1970-71 and 1971-72. Although both analyses are based upon essentially the same underlying data, the approaches utilized and the portions of the data emphasized by each party are different.

B. The government's analyses

The plaintiff's analyses classify each transfer approval as segregative, desegregative or of no effect. A transfer is termed segregative if it permits a student to change to a school in which students of his race are in a percentage at least ten per cent greater than that in the school in his zone of residence. If students in his race are in a percentage at least ten per cent less than that in the school in his zone of residence, the transfer is desegregative. If the difference in percentage is within ten per cent, either more or less, the approval has no effect. These analyses and additional evidence of the government are directed toward demonstrating segregative intent through three avenues:

(1) The number of segregatory transfers in the School District as a whole;

(2) The number of transfers by white students out of predominantly black schools;

(3) The number of transfers by white students into overcrowded majority or predominantly white schools.

(1) The School District as a whole

Graphs in the government's analyses list transfer approvals for the years 1970-71 and 1971-72 as follows:

1970-71

	Total	Segregative	Desegregative	No Effect
High Schools	1,024	413	203	408
Junior Highs	758	220	198	340
Elementary	1,770	608	202	960
TOTAL	3,552	1,241	603	1,708

1971-72

	Total	Segregative	Desegregative	No Effect
High Schools	1,015	453	178	384
Junior Highs	830	325	174	331
Elementary	2,041	733	264	1,044
TOTAL	3,886	1,511	616	1,759

These totals do not include denials of transfer requests, although this information is available elsewhere in the plaintiff's analyses.[11]

When denials are included, the totals are:

1970-71

	Total	Segregative	Desegregative	No Effect
High Schools	1,138	423	274	441
Junior Highs	925	278	219	428
Elementary	1,952	615	285	1,052
TOTAL	4,015	1,316	778	1,921
		(32.8%)	(19.4%)	(47.8%)

1971-72

	Total	Segregative	Desegregative	No Effect
High Schools	1,472	484	369	619
Junior Highs	1,102	411	253	438
Elementary	2,177	750	338	1,089
TOTAL	4,751	1,645	960	2,146
		(34.6%)	(20.2%)	(45.2%)

(2) Transfers out of predominantly black schools

In its transfer policy analyses, the government includes charts showing the number and race of transfers out of predominantly black schools or zones and the schools to which these transfers were made. Correlation of these charts with other data in evidence permits the following findings:

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[11] Denials are classified in this way: if the approval would have been segregative, the denial is desegregative; if the approval would have been desegregative, the denial is segregative; if the approval would have had no effect, the denial also has no effect.

(a) Elementary schools—The predominantly black elementary schools have always been located in a group in the northeastern portion of the School District. In 1970-71 there were 348 white transfers out of these predominantly black elementary schools and the vast majority of these were to nearby majority or predominantly white schools. There were 274 black transfers out of the predominantly black schools and the vast majority of these were to other predominantly black schools. The total number of elementary transfers for 1970-71 throughout the District was 1,770.

In 1971-72 there were 361 white transfers out of the predominantly black elementary schools and again they were principally to nearby majority or predominantly white schools. There were 274 black transfers out of predominantly black schools and they were principally to other predominantly black schools. The total of the elementary transfers in the District was 2,041.

(b) Junior highs—In 1970-71 and 1971-72 there were two predominantly black junior highs—Technical (1970-71 enrollment after transfers: 51 white, 540 black; 1971-72: 48 white, 551 black) and Mann (1970-71 enrollment after transfers: 7 white, 825 black; 1971-72: 16 white, 863 black). Transfers for these years were as follows:

	Transfers From Tech Zone		From Technical Zone to Majority or Predominantly White Schools		Transfers From Mann Zone		From Mann Zone to Majority or Predominantly White Schools		District-Wide Total of Junior High Transfers	
	White	Black	White	Black	White	Black	White	Black	White	Black
1970-71	68	16	68	16	25	144	21	68	497	261
1971-72	103	22	103	22	42	110	37	63	556	274

(c) Senior highs—The only high school which has ever been predominantly (or even majority) black is Technical. As mentioned earlier, Technical shares an attendance zone with Central. In 1970-71 there were 319 white transfers from the Central-Technical zone[12] with 250 of these to South High. There were 158 black transfers out of the Technical-Central zone, chiefly to Central, North and Tech.[13]

In 1971-72, there were 410 white transfers out of the Tech/Central zone, with 315 of these to South. There were 121 black transfers out of this zone, with the majority to North.

C. The defendants' analyses

As mentioned previously, the transfer policy analyses offered by the School District differ from those of the government in both the approach used and the data emphasized. The material presented in the defendants' analyses can be grouped into three categories:

(1) The effect of transfers contributing to racial imbalance on the School District as a whole.

(2) The effect of the transfer policy on eighty per cent black schools and on majority white schools.

(3) The treatment of transfer requests of both races.

(1) The effect on the School District as a whole

The defendant School District classifies all transfers granted for the years 1970-71 and 1971-72 as either contributory or non-contributory to racial imbalance in the schools. All schools are designated by racial enrollment as predominantly white (greater than sixty-five per cent white), majority white (greater than fifty per cent white, and hence minority black), majority black (greater than fifty per cent black and hence minority white), or predominantly black (greater than sixty-five per cent black). All transfers by a student to a school in which his race is in a more concentrated designation (*e. g.*, a white student transferring from a majority white school to a predominantly white school) are termed contributory. All transfers by a student to a school in which his race is in a concentration of the same designation or in a less concentrated designation (*e. g.*, a black student transferring from a majority black school to another majority black school, or to a majority white school) are termed noncontributory. Denials of requested transfers are not included by the defendants in their analyses. The totals for the two years in question are:

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[12] This mutual zone presents a problem in attempting to determine just which transfers were actually from Tech and which were from Central. In its analyses of this point, the government included all transfer requests where the zone of residence was listed as Technical, Central, or Technical/Central. The defendants' analyses of transfers from the eighty per cent black schools (which would include Tech) excluded all transfers from the Central/Tech zone. Thus, neither set of analyses presents a truly accurate picture of the students who transferred from the Technical/Central zone and who otherwise would have attended Tech.

[13] Thus, some black students switched from Tech to Central and vice versa. Central in 1970-71 was twenty-five per cent black and in 1971-72 was twenty-six per cent black.

	1970-71		1971-72	
	Contributory	Non-Contributory	Contributory	Non-Contributory
White	494	1,824	647	2,146
Black	108	752	116	782
TOTAL	602	2,576	763	2,928
	(18.94%)	(81.05%)[14]	(20.67%)	(79.32%)

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[14] Although the underlying data for both the government's and the defendant's analyses are essentially the same, comparison of the above figures with those reached by the government for transfer approvals shows that the defendants' totals are noticeably smaller. The discrepancy is no doubt due in large measure to the School District's omission from its analyses of any transfers in which the student's pre-transfer school or zone of residence was listed on the request as a combination zone (e. g., Central-Tech, or an optional zone, e.g., Norris-Lewis and Clark, Lewis and Clark-Norris-Tech Junior High, Hale-Morton). See footnote 12, supra.

(2) The effect on eighty per cent black schools and majority white schools

A second phase of the School District's analyses focuses on the net effect of the transfer policy on the black enrollments at certain schools. The first group of schools lists those in which the total enrollment was eighty per cent or more black:

		1970-71			1971-72	
Schools	Blacks Before	Blacks After	Net Result	Blacks Before	Blacks After	Net Result
Tech Sr.	991	1,013	22	966	951	—15
Mann Jr.	992	825	—167	980	863	—117
Tech. Jr.	483	540	57	525	551	26
Conestoga	326	341	15	389	400	11
Druid Hill	410	424	14	385	397	12
Fairfax	64	64	0	62	63	1
Franklin	937	906	—31	905	866	—39
Kellom	643	659	16	617	621	4
Kennedy	698	733	35	667	662	—5
Lake	279	279	0	250	257	7
Long	188	184	—4	--[15]	--	--
Lothrop	937	922	—15	849	836	—13
Saratoga	701	692	—9	639	639	0
TOTAL	7,649	7,582	—67	7,234	7,106	—128

Per cent of all black students in School District:

	64.91%	64.33%	—.58%	59.93%	58.86%	—1.07%

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[15] Long was closed following the 1970-71 school year.

The second group of schools includes those schools in which the total enrollment was fifty per cent or more white. Totals for the eighty-three such schools in 1970-71 and eighty-six in 1971-72 are as follows:

	Blacks Before	Blacks After	Net Result
1970-71	2,947 (25.0%)[16]	3,145 (26.7%)	+198 (1.7%)
1971-72	3,675 (30.4%)	3,918 (32.5%)	+243 (2.0%)

(3) Treatment of all transfer requests

The third phase of the evidence offered by the defendants is a comparison of the treatment of black and white transfer requests. This evidence shows the following:

	1970-71		1971-72	
	Number	Per Cent	Number	Per Cent
Total Requests by Whites	3,008		3,680	
Approvals	2,638	87[17]	2,978	80
Denials	370	12	702	19
Total Requests by Blacks	1,033		1,138	
Approvals	910	88	942	82
Denials	123	11	196	17

The School District also points out that under the plaintiff's analyses for 1970-71, 88.3 per cent of all white transfer requests were granted, along with 88.9 per cent of all black requests. For 1971-72, 81.3 per cent of all white transfer requests were granted, along with 83.1 per cent of all black transfer requests.

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[16] Percentage of all black students in the District.

[17] Percentages are not carried out to decimal places.

D. Conclusion

Based upon all the exhibits and testimony received in this case, the Court reaches the following conclusions concerning the defendants' special transfer policy:

(1) The operation of a special transfer policy is not per se evidence of segregative intent. There are many legitimate ends which such a policy may serve. *Kemp v. Beasley*, 352 F. 2d 14 (8th Cir. 1965). It is, however, a deviation from the announced neighborhood school policy and thereby is subject to close scrutiny.

(2) The race of the applicants has not been a factor in the School District's determination to grant or deny special transfers. Requests by black students have been granted with at least the same frequency as those of white students.

(3) The segregative effect of the transfer policy on the School District as a whole is slight. Under the plaintiff's analyses, 1,316 transfer actions in 1970-71 and 1,645 in 1971-72 were segregative. Yet there were over 63,000 students in the Omaha Public Schools for those years, and the segregative transfer actions, therefore, dealt with approximately 2.1 per cent and 2.6 per cent of the total student enrollments, respectively. If the numbers of approved transfers contributory to racial imbalance under the defendants' analyses are used, the percentages are even smaller.

(4) The effect of the transfer policy on the predominantly black schools is of greater consequence. The defendants' exhibits show that the black enrollments at eighty per cent black schools (Why the defendants have chosen eighty per cent is unclear; the figure sixty-five per cent, representing "predominantly" black schools has been used throughout the litigation by all parties.) has decreased slightly after implementation of the transfer policy. It is equally clear that the white enrollments at these schools and all predominantly black schools have decreased as a result of the policy.

The bare facts remain, however, that the special transfers under the policy in question were not granted upon any basis of racial conditions or considerations, and there is no question but what these transfers have been granted with the same frequency to black students as to white students. Further, the achievement level requirement applies equally to both black students and white students. Thus, the open transfer policy in question clearly meets constitutional tests heretofore handed down repeatedly by other courts. There is no pronouncement on the precise question by the United States Supreme Court, but approval here would clearly be indicated by that Court in its opinion in *Goss v. Board of Education of City of Knoxville,* 373 U. S. 683 (1963) wherein Justice Clark writing for a unanimous Court stated at page 688:

> This is not to say that appropriate transfer provisions, upon the parents' request, consistent with sound school administration and not based upon any state-imposed racial conditions, would fall. Likewise, we would have a different case here if the transfer provisions were unrestricted, allowing transfers to or from any school regardless of the race of the majority therein.

In *Bradley v. School Board of City of Richmond, Virginia,* 345 F. 2d 310 (4th Cir. 1965), *vacated on other grounds,* 382 U. S. 103 (1965), a case involving a transfer policy substantially similar to the transfer policy in question, the Court stated, at page 316, in approving the transfer system:

> It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. Everyone of every race has a right to be free of discrimination by the state by reason of his race. There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion

that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous.

The phrase from the second Brown decision to which the plaintiffs refer lends no support to their contention. The first paragraph of the opinion, in which the phrase appears, clearly and precisely expresses the proscription against "discrimination." There is no hint of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that each individual's freedom of choice may be affected by the equal right of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend.

This and other courts have repeatedly referred to the legality and propriety of a system of free transfers.

We first did so in Dillard v. School Board of City of Charlottesville, 4th Cir., 308 F. 2d 920, 923-924. In an opinion previously prepared by Senior Judge Soper, subsequently adopted per curiam as the opinion of the en banc court, there was approving reference to systems of unrestricted rights of transfer, which were said to have been conspicuously successful in Baltimore and in Louisville. Subsequently, in Jeffers v. Whitley, 4th Cir., 309 F. 2d 621, while condemning a compulsive system sought to be justified on the basis of assertions of volition of the pupils, we indicated en banc our approval of a truly voluntary system under which at reasonable intervals reasonable alternatives were available to all pupils, so that those who wished to do so might attend a school with members of the other race. Finally, when this case was before us earlier, this Court, anticipating the School Board's implementation of a system of free assignments and transfers, indicated its appropriateness, provided pupils, parents and the public in general were all informed of it. We there said in summary: (Footnote omitted.)

> "* * * As we clearly stated in Jeffers v. Whitley, 309 F. 2d 621, 629 (4th Cir. 1962), the appellants are not entitled to an order requiring the defendants to effect *a general inter-mixture of the races in the schools* but they are entitled to an order enjoining the defendants from refusing admission to any school of any pupil *because of the pupil's race.* The order should prohibit the defendants' conditioning the grant of a requested transfer upon the applicant's submission to futile, burdensome or discriminatory administrative procedures. If there is to be an absolute abandonment of the dual attendance area and 'feeder' system, if initial assignments are to be on a nondiscriminatory and voluntary basis, and if there is to be a right of free choice at reasonable intervals thereafter, consistent with proper administrative procedures as may be determined by the defendants with the approval of the District Court, the pupils, their parents and the public generally should be so informed." (Emphasis in original.)

See also, Taylor v. Board of Education of City School District of New Rochelle, 294 F. 2d 36 (2d Cir. 1961), *cert. denied,* 368 U. S. 940; *Bell v. School City of Gary, Indiana,* 324 F. 2d 209 (7th Cir. 1963), *cert. denied,* 377 U. S. 924 (1964).

In conclusion, the Court finds that the transfer policy of the defendants is constitutionally permissible, is not violative of the Constitution and was neither conceived nor maintained with a segregative intent.

VI. HIRING AND ASSIGNMENT OF BLACK FACULTY AND STAFF

The plaintiff and intervenors allege that the segregative intent of the defendants is also evident from the School District's policies concerning the hiring and placement of teaching faculty and staff.

In 1940-41 the first two black teachers were employed by the defendant School District and were assigned to Long Elementary School (predominantly black). The School District at this time had over 2,000 black students. By 1973-74 there were 227 black teachers and over 12,000 black students in the Omaha Public Schools. From 1940-41 through 1958-59, all of the black teachers employed by the School District were assigned to elementary schools and all of these schools were majority black. No black teachers were assigned to majority white schools until 1962-63.

The first black teachers were assigned to a junior high in 1959-60 when Horace Mann Junior High was opened (1959-60 enrollment: 71 per cent black). Seven of the twenty-three teachers assigned to Mann were black. Black teachers were first assigned to a majority white junior high in 1964-65. Between 1959-60 and 1971-72 (when Technical Junior High was closed) the large majority of black junior high faculty were assigned to majority black junior highs (*i. e.,* Mann or Tech), although only once did black teachers comprise a majority of the faculty at either of these schools.

Black faculty members first taught in the senior high schools in 1963-64, when two were assigned to Technical Senior High (51 per cent black) and one to North (9 per cent black).

The plaintiff and intervenors have also offered the testimony of six black persons who at some time were employed in the Omaha Public Schools, but whose treatment by the defendant School District with respect to hiring and placement is alleged to have been racially discriminatory. Three of these black people are currently employed by the School District, one as an assistant superintendent, one as a junior high principal, and one as a senior high assistant principal. The other three are no longer with the school system. The experiences of a white assistant superintendent concerning his hiring and placement by the School District have been offered by the defendants, as well as other documentary evidence. From this material and that in the preceding paragraphs, the Court makes the following findings:

(1) Through the early 1960's a very small number of black teachers was employed by the School District in comparison to the number of black persons enrolled as students. However, there is little evidence of any kind concerning the availability of black teachers during this time period, and what little evidence there is would indicate that there were few qualified black teachers to be hired. The evidence does show that in the 1950's and early 1960's teachers of both races were employed by the School District even though they did not have the proper state certification. There is insufficient evidence to show an intentionally racially discriminatory policy of the School District with respect to *hiring* for any time period.

(2) There is evidence which demonstrates that through the early 1960's the School District had a policy of placing black faculty members solely in schools with majority black enrollments.

(3) There is evidence which demonstrates that through the early 1960's, the School District refused to place qualified black secondary teachers at the secondary level. These people were employed but placed at the elementary level. The number of black teachers so treated was small, and this same situation was also applicable to some white teachers for certain years. However, there was no pattern shown for white teachers as there was for black teachers.

In 1963 the School District began an active recruitment program for minority personnel. Extensive trips were made by principals and other representatives of the School District to several states for the purpose of visiting college campuses with substantial numbers of black students. These representatives explained the Omaha Public School System to minority college students and

encouraged applications. The schools visited have been primarily black colleges and universities in the southern and western United States. The success of recruitment has been periodically re-evaluated and new schools have been added to the list if those previously visited have not produced a sufficient number of applications. The following chart deals with the hiring of black faculty since the institution of this recruitment program:

	Total Black Faculty in District	Black Teachers at Majority Black Schools	Black Faculty as Per Cent of Total Faculty	Black Supervisory and Administrative Personnel
1963-64	76	72	4.1	3
1964-65	104	92	5.2	5
1965-66	105	94	5.1	13
1966-67	123	109	5.8	15
1967-68	136	116	6.1	12
1968-69	160	139	6.9	18
1969-70	164	128	6.8	22
1970-71	186	137	7.5	25
1971-72	186	149	7.0	38
1972-73	214	121	7.7	42
1973-74	227	unavailable	8.0	41

From 1964-65 through 1972-73, 47.5 per cent of all certificated (*i. e.,* those possessing appropriate Nebraska teaching certificates) black applicants were offered teaching contracts, and 37 per cent were hired. Some 10.5 per cent did not accept the contracts. For the same time period, 25.1 per cent of all white certificated applicants were hired (no statistics were kept on the percentage of white applicants offered contracts but who rejected them during 1964-69). During 1969-70 through 1972-73, 50.6

per cent of all certificated black applicants were offered teaching contracts, and 39.9 per cent were hired. For the same period, 24 per cent of all certificated white applicants were offered contracts and 19 per cent were hired.

CONCLUSION

The Court concludes that the School District has never had a policy of discriminating against black teachers in hiring. The School District did, from approximately 1940 through the early 1960's, have a policy of placing black teachers in majority black schools only, and also had a policy of confining qualified black secondary teachers to the elementary grades. However, these placement policies were discarded in approximately 1963 and the Court concludes from all the evidence that substantial progress has been made in eradicating the effects of these policies. This has been due in large measure to affirmative action taken by the School District not only as to placement but also as to hiring.

There is also some evidence that in evaluating the effectiveness of teachers preparatory to assigning them to schools, the School District felt that black teachers would have greater success than white teachers in working with black students. Also, there is some evidence that the School District felt that having successful black role models was important for black children, and particularly with regard to male teachers at the elementary level. Whatever may be the relative merits of this theory, and the Court intimates no opinion on this point, the Court finds that the School District held this belief in good faith, and that this fact is entitled to some weight in any ultimate conclusion regarding segregative intent on the part of the School District.[18]

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[18] If this theory is in fact erroneous educationally speaking, the School District was not the only entity in the community in error. One of the criticisms of the Omaha Ministerial Alli-

(Continued on following page)

VII. GENERAL CONSTRUCTION

The plaintiff and intervenors argue that segregative intent can also be inferred from an examination of the School District's new school construction program. This includes construction of Martin Luther King Middle School, the motives for construction of which were probed extensively at the preliminary injunction hearing, 367 F. Supp. at 183, *et seq.*

There is no claim that the defendants have operated rundown or physically inferior buildings for the schools with substantially black enrollments. The argument, rather, is that the School District has constructed new schools knowing that the racial composition at these schools would be either predominantly black or predominantly white and that, therefore, the School District acted with segregative intent in building these schools.

The evidence shows that from 1951 through 1973, thirty-nine new school buildings or additions were erected by the School District, of which thirty-seven opened with predominantly white or predominantly black enrollments. Twenty-one of these buildings or additions were construced from 1964 through 1973, and all of them opened predominantly white or black. Certainly School District officials did know or should be charged with knowing, the racial compositions at these schools. But to say that the School District, therefore, acted with segregative intent simply does not follow and cannot be stated.

(Continued from previous page)

ance (a group of black religious leaders in the Omaha-Council Bluffs area) concerning Technical High in 1972 was that while the black-white student ratio was 91.5-8.5, the teacher ratio was 14.6-85.4. The criticism was that the Tech students were thus deprived of persons who could understand their heritage and relate to them satisfactorily. One of the Alliance's recommendations was that the faculty at both Technical Senior and Technical Junior High be at least 60 per cent black.

Of the thirty-nine new schools opened since 1951, twenty-one were built in predominantly white residential areas added to the School District since 1955. There either were no schools available in these areas or the existing schools were inadequate to serve the neighborhood. The remaining eighteen were constructed throughout the area served by the School District in 1955, in residential areas substantially white, substantially black and mixed. The evidence does not disclose any sort of pattern of concentrating new schools in black neighborhoods or neighborhoods changing from white to black. In short, there simply was no pattern of "containment" as charged by the plaintiff and intervenors. New schools and additions were placed either as a means of coping with increased enrollments or as replacements for older, inadequate facilities.

It is undoubtedly true that many of these new schools could have opened with substantially less polarized racial enrollments if the School District had taken affirmative action in that regard—*e. g.*, by changing attendance boundaries, exchanging grades between different schools, or mass transportation. But absent any segregative pattern, the Court finds the placement of new schools and additions to be entirely consistent with the defendants' neighborhood school policy. Therefore, the failure of the defendants to take such affirmative action is not evidence of segregative intent.

VIII. HOUSING

There has been considerable evidence introduced by the intervenors for the purpose of proving the existence of residential segregation in the City of Omaha over the past three decades, and of establishing some basis upon which the defendant School District can be held responsible for this situation. This evidence has generally fallen into two categories:

(1) Involvement of the Omaha Public Schools with the housing situation;

(2) Discriminatory practices attributable to city, state and federal agencies or governments.

(1) Involvement of the Omaha Public School System

The evidence in this category has been introduced for the purpose of proving four propositions:

(a) That there is substantial residential segregation in the City of Omaha, especially in its newer subdivisions.

(b) That this segregation has been caused to a substantial degree by segregatory practices of real estate companies—e.g., through restrictive covenants, restricted home listings, and the exclusion of blacks from employment in the real estate industry.

(c) That the defendant School District has consulted with real estate companies concerning the location of schools and proposed subdivisions.

(d) That this consultation constituted substantial involvement in the development of segregated subdivisions, which is evidence of the School District's general segregative intent.

The Court assumes, without deciding, the validity of point (a). Because of the Court's findings with respect to Points (c) and (d), none are required concerning point (b), and the Court hesitates to venture unnecessarily into an area in which the principal persons involved (the realtors) have had no opportunity to present evidence in their behalf.

The Court does find that the School District has, from approximately 1950 to the present, consulted with real estate companies concerning the location of schools in residential subdivisions. The evidence also shows that at least one prominent realty company has given some school land to the District outright, and has sold and continues to sell other school land to the District at the company's cost. The evidence is clear that this company has had no input concerning the size or racial composition of any such school.

The Court does not, however, find that this constitutes such a level of involvement with subdivision development as to make the School District responsible for any segregation which may have occurred. School District officials, to properly perform their duties, must be aware of areas of residential development and the possibility of annexation of new subdivisions to the District. It is, therefore, only prudent for these officials to consult with developers concerning the providing of school services for these areas. This prudence is both logistical, in terms of the most desirable location of school facilities, and fiscal, in terms of acquiring sites at the lowest possible cost. There is no indication whatsoever that the School District desired, encouraged, or promoted any residential segregation. Further, there is no evidence that the racial composition of these subdivisions was ever discussed or considered by School District officials in any consultations with real estate companies.

(2) Other governmental activity

The intervenors have also introduced evidence for the purpose of showing that acts and practices of certain bodies in various levels of government have contributed to a segregated residential condition in the School District, for which, through application of its neighborhood school policy, the School District must now be held responsible. This evidence concerned the location of family-occupied public housing projects by the Omaha Housing Authority (an agency of the City of Omaha) and the placement of families by race within those projects from 1938 to the mid-1950's; legislation passed by the State of Nebraska in 1965 which prohibited real estate brokers or salesmen from refusing to show, sell, rent or lease property on the basis of race unless the owner so specified; judicial enforcement of restrictive covenants by the State of Nebraska prior to 1948; and policies of the Federal Housing Administration in the 1930's concerning the underwriting of home mortgages where the sales would introduce "inharmonious" racial or nationality groups.

The intervenors' theory with respect to this evidence is not that the School District's failure to prevent these policies and practices is evidence of segregative intent, but that since these are governmental bodies and agencies, their conduct constitutes state action for which the School District must now provide some remedy. The Court is aware that this theory has been adopted by some courts, *Hart v. Community School Board of Brooklyn, New York School District No. 21*, No. 72-C-1041 (E.D.N.Y., Filed January 28, 1974); *Oliver v. Kalamazoo Board of Education*, 368 F. Supp. 143 (W. D. Mich. 1973). However, assuming the validity of this theory, upon which the Court does not pass, the Court simply does not agree that the evidence introduced herein is of a character sufficient to show state action as the substantial cause of racial imbalance in the Omaha Public Schools. The evidence introduced on this point consists entirely of isolated incidents or practices, most of which took place from two to four decades ago. Compare the substantial governmental activity related in *Hart* and *Oliver, supra*. This Court simply does not feel that the incidents and practices introduced in evidence are of sufficient probative value to permit the Court to conclude that the individual or combined actions of the city, state and federal governments have been a substantial factor in causing purported current residential segregation within the School District.

CONCLUSION

As stated previously, this litigation has been focused upon the second requirement in *Keyes*, namely, whether the current racial imbalance in the Omaha School System was intentionally caused or maintained by the defendants. Further, as is apparent, we are dealing with a school system which has developed on the neighborhood plan and which has traditionally been so maintained. We are not confronted here with a dual system, operated either statutorily or constitutionally, but rather with an historic unitary system based upon a neighborhood school plan. There can be no doubt that such a plan, if administered without an intentionally segregative policy practiced in a meaningful or significant portion of the system, is constitutionally valid regardless of some resulting degree of racial imbalance. In *Deal v. Cincinnati Board of Education,* 369 F. 2d 55 (6th Cir. 1966), the Court stated at page 60:

> Appellants, however, pose the question of whether the neighborhood system of pupil placement, fairly administered without racial bias, comports with the requirements of equal opportunity if it nevertheless results in a creation of schools with predominantly or even exclusively Negro pupils. The neighborhood system is in wide use throughout the nation and has been for many years the basis of school administration. This is so because it is acknowledged to have several valuable aspects which are an aid to education, such as minimization of safety hazards to children in reaching school, economy of cost in reducing transportation needs, ease of pupil placement and administration through the use of neutral, easily determined standards and better home-school communication.

Justice Powell, in *Keyes,* at page 246, stated that the legitimacy of the neighborhood concept rests on even more basic grounds:

> Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education. Public schools have been a traditional source of strength to our Nation, and that strength may derive in part from the identification of many schools with the personal features of the surrounding neighborhood. Community support, interest, and dedication to public schools may well run higher with a neighborhood attendance pattern: distance may encourage disinterest. Many citizens sense today a decline in the intimacy of our institutions—home, church, and school—which has caused a concomitant decline in the unity and communal spirit of our people. I pass no judgment on this viewpoint, but I do believe that this Court should be wary of compelling in the name of constitutional law what may seem to many a dissolution in the traditional, more personal fabric of their public schools.
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> * * *
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> In the commendable national concern for alleviating public school segregation, courts may have overlooked the fact that the rights and interests of children affected by a desegregation program also are entitled to consideration. Any child, white or black, who is compelled to leave his neighborhood and spend a significant time each day being transported to a distant school suffers an impairment of his liberty and his privacy. Not long ago, James B. Conant wrote that "(a)t the elementary school level the issue seems clear. To send young children day after day to distant schools by bus seems out of the question." A community may well conclude that the portion of a child's day spent on a bus might be used more creatively in a classroom, playground, or in some other extracurricular school activity. Decisions such as these, affecting the quality of a child's daily life, should not lightly be held constitutionally errant. (Footnote omitted.)

This Court has made a careful and painstaking review of the record and excellent briefs before it and has carefully considered the arguments and theories of all parties to this litigation, as advanced by competent and well-qualified counsel. From all the evidence before it, and from reviewing the many cases dealing with the segregation problem, this Court is convinced that this record simply does not justify the finding and determination that the school authorities in question intentionally discriminated against minority students by practicing a deliberate policy of racial segregation. Without such a finding, the law does not require that a school system developed on the neighborhood plan, honestly and conscientiously framed and administered, without intention or purpose to discriminate racially, must be set aside or abandoned because a racial imbalance in certain schools sometimes is the result. *See Bell, supra.*

This Court has no authority, nor any directive, to substitute its opinion for what would constitute a good policy or better policy for that of the School Board unless the policy in question is violative of the Constitution. As stated in *Davis v. School District of Pontiac,* 474 F. 2d 46, 48 (6th Cir. 1973) (Kent, J., dissenting):

> [T]here is no authority in a court of equity to impose upon parties to the action remedies which the trial judge may *think* would be a good policy. Policy is for the school authorities, except as and unless such policy creates a condition which offends the Constitution.

This Court does not claim to have all the answers to the problems of racial imbalance within some of the public schools in our community or in our state or in our nation. But the Court would observe that the many different answers and proposed remedies are best left to the sound judgment and discretion of the appropriate officials and the citizens in the communities involved, with the provision, of course, that such judgments and discretion be exercised within the framework of the Fourteenth Amendment and without discrimination based upon race, creed, religion or color.

Therefore, in accordance with this Memorandum Opinion, an order will be entered this day dismissing the complaints of the plaintiff and intervenors herein.

By the Court:

/s/ Albert G. Schatz
Judge, United States District Court.

IN THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF NEBRASKA

CIV. 73-0-320

UNITED STATES OF AMERICA,
Plaintiff,

and

NELLIE MAE WEBB, et al.,
Intervenors,

vs.

THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,
Defendants.

ORDER

(Filed October 15, 1974)

Pursuant to the Memorandum Opinion of the Court filed this day, the complaints of the plaintiff and intervenors are hereby dismissed, with all parties to pay their own costs.

IT IS SO ORDERED.

By the Court:

/s/ Albert G. Schatz,
Judge, United States District Court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 74-1964
No. 74-1993

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
and
NELLIE MAE WEBB, et al.,
Plaintiffs-Intervenors-Appellants,
vs.
SCHOOL DISTRICT OF OMAHA, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the District of Nebraska.

Submitted: April 17, 1975

Filed: June 12, 1975

Before JONES, Senior Circuit Judge,* and HEANEY and BRIGHT, Circuit Judges.

HEANEY, Circuit Judge.

The issue presented by this appeal is whether the undisputed racial segregation which exists in the Omaha public schools denies to black students the equal protection of the laws guaranteed by the fourteenth amendment. Because segregated educational facilities were never mandated by law, it is conceded that a finding of unconstitutionality is dependent on a finding that the segregation was brought about or maintained by intentional state action. We conclude that sufficient evidence was presented to establish that segregation in the Omaha School District[1] was intentionally created and maintained by the defendants.[2] Accordingly, we require that the Omaha School District be integrated, establish guidelines for achieving that goal, and remand to the District Court to supervise the process.

I. THE SEGREGATED NATURE OF THE SCHOOL DISTRICT.

The Omaha public schools are segregated. The District Court so found, and the defendants do not contest that finding. Nevertheless, we briefly describe the segregated nature of the schools. In 1973-74, the School District of Omaha had a student population of 60,502, of whom 20% were black. It operated eight high schools, twelve junior highs, one middle school (grades 5-7), and seventy-eight elementary schools. Over 50% of the black students in the District attended schools which had an 80% to 100% black enrollment,[3] while 73% of the white

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* WARREN L. JONES, Senior Circuit Judge, Fifth Circuit, sitting by designation.

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[1] The District embraces most of the City of Omaha and part of Sarpy County, Nebraska.

[2] The defendants are the School District of Omaha [District], the Superintendent of Schools for the District, and the twelve members of the Board of Education for the District.

[3] The following chart represents the number of black students who attended schools which were 35% or more black in 1973-74:

	Total Black Enrollment	Black Enrollment in Schools 35% or More Black
Elementary Schools	6,876	5,638
Junior High Schools	2,634	2,291
High Schools	2,452	1,355
	11,962	9,284

students attended schools with black enrollments of less than 5%.

At the high school level, Tech was 96% black, and shared a common attendance zone with Central, which was 32% black. North was 36% black, Benson was 14% black, and South was 3% black. The remaining three high schools enrolled less than fifteen black students.

At the junior high level, Horace Mann was 97% black, Monroe was 39% black, McMillan was 36% black, Indian Hill was 19% black, Hale was 10% black, and Lewis and Clark was 5% black.[4] The six remaining junior high schools had enrollments of less than 3% black. One middle school, Martin Luther King, opened in September, 1973, with an 82% black enrollment.

At the elementary level, three schools (Kennedy, Lothrop, and Conestoga) were over 90% black. An additional seven were between 75% and 90% black, two were between 50% and 75% black, two were between 35% and 50% black, ten were between 10% and 35% black, three were between 5% and 10% black, and eighteen were between 1% and 5% black. Thirty-three elementary schools were either all white or had less than 1% black enrollment.

The faculties were also segregated. In 1972-73, the latest year for which figures were provided in the record, the District employed 193 black teachers. Of that number, 121 or 62% were assigned to majority black schools,[5] and 159 or 82% were assigned to the twenty-

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[4] Tech Junior High was 91% black in its final year of operation, 1971-72.

[5] Hereinafter, we use the following terms used by the parties and the District Court: "Majority" white or black means that the enrollment at a given school is at least 50% of the designated race. "Predominantly" white or black means that the enrollment is at least 65% of the designated race.

three schools which had a black enrollment exceeding 25%. Thus, only 18% of the black teachers were assigned to the seventy-five schools with enrollments less than 25% black.

At the high school level, 23 of the 49 black teachers were assigned to Tech (95% black), and 44 black teachers (90% of the total) were assigned to the three high schools with more than 30% black enrollment: Tech, Central and North. Only five black high school teachers were assigned to the five remaining high schools, and two of those were assigned to Benson, which was 10% black. One high school, Northwest, had no black teachers.

At the junior high level, 18 of the 38 black teachers were assigned to Mann (98% black), and 28 black teachers (74% of the total) were assigned to the three junior high schools with more than 30% black enrollment: Mann, McMillan and Monroe. The ten remaining black teachers were assigned to five junior high schools. Four junior high schools had no black teachers.

At the elementary level, 79 of the 106 black teachers (or 75%) were assigned to ten schools with black enrollments of over 75%, and 86 black teachers (81% of the total) were assigned to the sixteen elementary schools with black enrollments exceeding 25%. The remaining 20 black elementary teachers were sprinkled over the sixty-two schools with less than 25% black enrollment. Lothrop elementary (96% black) had more black elementary teachers than those sixty-two schools combined. At least forty-six elementary schools with predominantly white enrollments did not have a single black faculty member.

No discussion of the segregated nature of the Omaha public schools would be complete without mention of the segregated housing patterns in the city and some of the reasons therefor. The area in which most of the black community resides is commonly referred to as the "Near North Side." The area encompassed by that term has changed as blacks have spread out from the core area, particularly toward the northwest. Newly developing residential areas on the periphery of the city, as well as older residential areas beyond the Near North Side's "encroachment pattern," remain almost exclusively white.

The evidence established that segregated housing patterns in the city were the result of discriminatory state and private actions. Between 1938 and 1953, the Omaha Housing Authority opened five large family-occupied public housing projects. Four were constructed in, or adjacent to, the Near North Side, and each was over 95% black in 1973. One was located in South Omaha, and became a "white project." The Housing Authority encouraged racially discriminatory housing assignment by allowing white applicants for public housing to turn down openings in "black" projects while remaining at the top of the priority list. *Compare Gautreaux v. Chicago Housing Authority*, 296 F. Supp. 907 (N. D. Ill. 1969). By 1955, the school board was aware of the segregated nature of the housing projects and was struggling to cope with large increases in black enrollment causing overcrowding at Druid Hill, Kennedy, Kellom, Lake, and Lothrop elementary schools.[6]

Private racial discrimination in the housing market was also prevalent. It was common for racial covenants to be included in deeds even after *Shelley v. Kraemer*, 334

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[6] An early school report published in 1951 recognized that

> * * * There is a tendency toward the restriction of the residence of Negroes, which has caused a certain amount of geographical segregation. * * *

That report also stated:

> * * * Segregation, even though it is a result of residence rather than administration, is most undesirable educationally. Certainly it is a factor which must be taken into consideration in the redistricting of the elementary schools and in the location of new school structures.

Later reports by and large ignored racial segregation in the schools.

U. S. 1 (1948). In 1953, the Code of Ethics discouraged realtors from selling property to blacks in a white neighborhood. In the late 1960's, sellers were given an option by the realtors to cross out a sentence barring discrimination in listing agreements. And, at least from 1965 through 1968, it was common practice to put the word "CONDITIONS" on any multiple listing where the seller had indicated that he did not wish to sell the property to minorities. Approximately one-third to one-half of multiple listing cards during that period had this notation.

II. THE LEGAL STANDARD GOVERNING PROOF OF UNCONSTITUTIONAL SCHOOL SEGREGATION

Although *Brown v. Board of Education*, 347 U. S. 483 (1954), dealt only with a school system in which segregation was mandated by law, it has since been made clear in a series of "northern and western" cases[7] that no inten-

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[7] See, e.g., Milliken v. Bradley, 41 L. Ed. 2d 1069 (1974) (Detroit); Keyes v. School District No. 1, 413 U. S. 189 (1973) (Denver); Hart v. Community School Bd. of Ed., N. Y. Sch. Dist. No. 21, 512 F. 2d 37 (2nd Cir. 1975) (New York City); Morgan v. Kerrigan, 509 F. 2d 580 (1st Cir. 1974), cert. denied, 43 U. S. L. W. 3601 (1975) (Boston); Oliver v. Michigan State Board of Education, 508 F. 2d 178 (6th Cir. 1974), cert. denied, 43 U. S. L. W. 3601 (1975) (Kalamazoo); Berry v. School Dist. of City of Benton Harbor, Mich., 505 F. 2d 238 (6th Cir. 1974); Brinkman v. Gilligan, 503 F. 2d 684 (6th Cir. 1974) (Dayton); Johnson v. San Francisco Unified School District, 500 F. 2d 349 (9th Cir. 1974); Soria v. Oxnard School District Board of Trustees, 488 F. 2d 579 (9th Cir. 1973), cert. denied, 416 U. S. 951-952 (1974); United States v. Board of Sch. Com'rs of Indianapolis, Ind., 474 F. 2d 81 (7th Cir.), cert. denied, 413 U. S. 920 (1973); Kelly v. Guinn, 456 F. 2d 100 (9th Cir. 1972), cert. denied, 413 U. S. 919 (1973) (Las Vegas); Davis v. School District of City of Pontiac, Inc., 443 F. 2d 573 (6th Cir.), cert. denied, 404 U. S. 913 (1971); United States v. School District

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tionally segregated school system can be tolerated under the Constitution. It is equally clear that the "intent" which triggers a finding of unconstitutionality is not an intent to harm black students, but simply an intent to bring about or maintain segregated schools. Thus, even if a school board believes that "separate but equal" is superior for black children, that belief will not save the intentional segregation from a finding of unconstitutionality. "Benevolence of motives does not excuse segregative acts." *Oliver v. Michigan State Board of Education,* 508 F. 2d 178, 182-183 (6th Cir. 1974), cert. denied, 43 U. S. L. W. 3601 (1975). *See also **Burton v. Wilmington Parking Authority,*** 365 U. S. 715, 725 (1961); ***Hart v. Community School Bd. of Ed., N. Y. Sch. Dist. No. 21,*** 512 F. 2d 37, 50 (2nd Cir. 1975).

Since segregation in the Omaha public schools was obvious at the time of trial, the only question presented to the District Court was whether or not the defendants intended to bring about or maintain that condition. The District Court properly recognized that segregative intent usually must be inferred. It held, however, that the burden of proving such intent rested at all times on the appellants, and concluded that the appellants had failed to meet that burden, despite its findings that various acts and omissions of the defendants had the natural, probable foreseeable and actual consequence of creating and maintining segregation.[8]

We hold that a presumption of segregative intent arises once it is established that school authorities have engaged in acts or omissions, the natural, probable and foreseeable consequence of which is to bring about or maintain segregation.[9] When that presumption arises, the burden shifts to the defendants to establish that "segregative intent was not among the factors that motivated

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151 of Cook County, Ill., 432 F. 2d 1147 (7th Cir. 1970), **cert. denied,** 402 U. S. 943 (1971); **Taylor v. Board of Ed. of City Sch. Dist. of New Rochelle,** 294 F. 2d 36 (2nd Cir.), cert. denied, 368 U. S. 940 (1961); **Clemons v. Board of Education of Hillsboro,** 228 F. 2d 853 (6th Cir.), **cert. denied,** 350 U. S. 1006 (1956); **Husbands v. Pennsylvania,** 43 U. S. L. W. 2427 (E. D. Pa. March 31, 1975); **Booker v. Special School Dist. No. 1, Minneapolis, Minn.,** 351 F. Supp. 799 (D. Minn. 1972); **Spangler v. Pasadena City Board of Education,** 311 F. Supp. 501 (C. D. Calif. 1970).

[8] The district Court found in several instances that the segregative results were not only foreseeable, but that the defendants had conscious knowledge of the likelihood of such results, particularly with respect to faculty assignment, school construction and the deterioration of Tech High.

[9] The use of presumptions in civil rights cases is not a novel one. **See Keyes v. School District No. 1, supra at 209. See also** Comment, **Unlocking the Northern Schoolhouse Doors,** 9 HARV. CIV. RIGHTS CIV. LIB. L. REV. 124, 141 (1974) As the Supreme Court said in **Keyes:**

> * * * In the context of racial segregation in public education, the courts, including this Court, have recognized a **variety of situations** in which "fairness" and "policy" require state authorities to bear the burden of explaining actions or conditions which appear to be racially motivated. Thus, in Swann, 402 U. S., at 18 * * * we observed that in a system with a "history of segregation," "where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a prima facie case of violation of substantive constitutional rights under the Equal Protection Clause is shown." * * * Nor is this burden-shifting principal limited to former statutory dual systems. * * *

Keyes v. School District No. 1, supra at 209-210 (Emphasis supplied).

their actions." *Keyes v. School District No. 1,* 413 U. S. 189, 210 (1973).

Two other Circuits have recognized a presumption based on the natural, probable and foreseeable consequences test. *Hart v. Community School Bd. of Ed., N .Y. Sch. Dist. No. 21, supra* at 50-51; *Oliver v. Michigan State Board of Education, supra* at 182. The Second Circuit reasoned:

> * * * [W]e believe that a finding of *de jure* segregation may be based on actions taken, coupled with omissions made, by governmental authorities which have the natural and foreseeable consequence of causing educational segregation. * * *
>
> To say that the foreseeable must be shown to have been actually foreseen would invite a standard almost impossible of proof save by admissions. When we consider the motivation of people constituting a school board, the task would be even harder, for we are dealing with a collective will. It is difficult enough to find the collective mind of a group of legislators. See Palmer v. Thompson, 403 U. S. 217, 224-25 * * * (1971); and see Keyes v. School District No. 1, supra, 413 U. S. at 233-34 * * * (Powell, J., concurring). It is even harder to find the motivation of local citizens, many of whom would be as reluctant to admit that they have racial prejudice as to admit that they have no sense of humor.
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> * * *
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> Speaking in *de jure* terms does not require us, then, to limit the state activity which effectively spells segregation only to acts which are probably motivated by a desire to discriminate. See Wright v. Council of City of Emporia, supra, 407 U. S. at 461-62 * * *. Aside from the difficulties of ferreting out a collective motive and conversely the injustice of ascribing collective will to articulate remarks of particular bigots, the nature of the "state action" takes its quality from its foreseeable effect. The Fourteenth Amendment is not meant to assess blame but to prevent injustice.

Hart v. Community School Bd. of Ed., N. Y. Sch. Dist. No. 21, supra at 50 (Footnotes omitted.) *Cf. Morgan v. Kerrigan,* 509 F. 2d 580, 588 (1st Cir. 1974), *cert. denied,* 43 U. S. L. W. 3601 (1975).[10]

We have previously used language which supports the use of a presumption in cases like this one:

> * * * Simply to say there was no intentional gerrymandering of district lines for racial reasons is not enough. As Mr. Justice Harlan once observed, "[T]he object or purpose of legislation is to be determined by its natural and reasonable effect, whatever may have been the motives upon which legislators acted." New York ex rel. Parke, Davis & Co. v. Roberts, 171 U. S. 658, 681 * * * (1898) (dissenting opinion). * * *

Haney v. County Board of Education of Sevier County, Ark., 410 F. 2d 920, 924 (8th Cir. 1969).

Because the District Court failed to recognize such a presumption, it gave insufficient effect to its own factual findings. We conclude that, in five decision-making areas, the appellants produced substantial evidence that the defendants' actions and inactions in the face of tendered choices had the natural, probable and foreseeable consequence of creating and maintaining segregation. The five areas include faculty assignment, student transfers, optional attendance zones, school construction, and the deterioration of Tech High. The proof in each area was sufficient in and of itself to trigger the presumption of segregative intent.[11] We also conclude that the defendants failed to carry their burden of establishing that segregative intent was not among the factors which motivated their actions. Accordingly, we hold that the segregation in the Omaha public schools violates the Constitution and must be "eliminated root and branch." *Green v. School Board of New Kent County,* 391 U. S. 430, 438 (1968).

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[10] In **Bradley v. Milliken,** 338 F. Supp. 582, 587, 592 (E. D. Mich. 1971), **aff'd in part & vacated in part,** 484 F. 2d 215 (6th Cir. 1973), **rev'd on other grounds,** 41 L. Ed. 2d 1069 (1974), the District Court found unconstitutional segregation based on a test of natural, probable and foreseeable consequences. The Supreme Court noted this, **Milliken v. Bradley, supra** at 1080, and affirmed that portion of the District Court's opinion, stating that, "under our decision last Term in **Keyes** * * * the findings [of **de jure** segregation] appear to be correct." **Id.** at 1087 n. 18.

III. THE EVIDENCE ESTABLISHING INTENTIONAL SEGREGATION.

A. FACULTY ASSIGNMENT

The history of faculty assignment in the Omaha public schools demonstrates that the faculty segregation detailed

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[11] In light of the conclusive evidence of intentional segregative practices by the school district, we have not addressed ourselves to the appellants' contention that the public and private racial discrimination in housing provides an alternate ground for ordering all-out school integration. However, we do subscribe to the Fourth Circuit's reasoning:

> * * * If residential racial discrimination exists, it is immaterial that it results from private action. The school board cannot build its exclusionary attendance areas upon private racial discrimination. * * *

Brewer v. School Board of City of Norfolk, Va., 397 F. 2d 37, 41-42 (4th Cir. 1968) (en banc). **See also United States v. Board of Sch. Com'rs of Indianapolis, Ind., supra at 85-86, 88; Kelly v. Guinn, supra at** 105 n. 7; **Spangler v. Pasadena City Board of Education, supra at 522. Cf. Milliken v. Bradley, supra at 1097** (Stewart, J., concurring); **Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 7 (1971); Johnson v. San Francisco Unified School District, supra at 351.**

in Part I of this opinion resulted from intentional racial discrimination. The Omaha school district hired its first two black teachers in 1940-41, assigning them to majority black elementary schools. During the next twenty-three years, every black teacher hired by the District was assigned to a majority black school. As of 1961-62, the 57 black teachers employed by the District were assigned to seven majority black schools, and eighty majority white schools did not have a single black teacher. No black teachers were assigned to the secondary level until 1959-60, when seven were assigned to Mann Junior High, which opened as the first majority black secondary school, with a 71% black enrollment. No black teachers were assigned to the high school level until 1963-64, the first year in which a majority black high school existed. Two black teachers were then assigned to Tech High (51% black), and one was assigned to North (9% black).

In light of the foregoing evidence, the District Court properly found that, from 1940 to "the early 1960's," the school district had

> * * * a policy of placing black teachers in majority black schools only, and also had a policy of confining qualified black secondary teachers to the elementary grades. * * *

United States v. School Dist. of Omaha [*Omaha II*], 389 F. Supp. 293, 318 (D. Neb. 1974).[12]

However, it erred in finding that the segregative placement policies were "discarded in approximately 1963" and that

> * * * substantial progress has been made in eradicating the effects of these policies. This has been due in large measure to affirmative action taken by the

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[12] The deliberate racial discrimination in faculty assignment was, in and of itself, a violation of the fourteenth amendment. **Morgan v. Kerrigan, supra at 595.**

> School District not only as to placement but also as to hiring.

Id. 318-319.

For the record demonstrates that, although the "affirmative action program" brought more black teachers into the system, the racially discriminatory assignment policies were continued. Of 81 new black teachers hired between 1963 and 1969, 67 were assigned to majority black schools. In 1972-73, 82% of all black teachers continued to be assigned to schools having a black enrollment exceeding 25%, even though such schools comprised only one-fourth of the total number of schools in the District. In that year, fifty-one, or more than half, of the District's approximately ninety-eight schools still did not have a single black faculty member. *Compare Swann v. Charlotte-Mecklenburg Board of Education,* 402 U. S. 1, 19-20 (1971); *United States v. Montgomery County Board of Education,* 395 U. S. 225, 232-233 (1969); *Berry v. School Dist. of City of Benton Harbor, Mich.,* 505 F. 2d 238, 240-241 (6th Cir. 1974); *Booker v. Special School Dist. No. 1, Minneapolis, Minn.,* 351 F. Supp. 799, 804-805 (D. Minn. 1972).

Since it was established that the faculty was segregated on the basis of race—the natural, probable and foreseeable consequence of which was to identfy some schools as "black schools"—a presumption of segregative intent arose, and the burden shifted to the defendants to prove that segregative intent was not among the factors which motivated their decision making.[13] This presumption was not rebutted in the record.[14]

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[13] The Supreme Court has indicated that proof of faculty segregation raises a presumption that the entire system has been segregated as a result of intentional action. **See Swann v. Charlotte-Mecklenburg Board of Education, supra** at 18. As the Ninth Circuit has noted:

> * * * [T]eacher assignment is so clearly subject to the complete control of school authorities unfettered by such

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> extrinsic factors as neighborhood residential composition or transportation problems, that the assignment of an overwhelmingly black faculty to black schools is strong evidence that racial considerations have been permitted to influence the determination of school policies and practices. * * *

Kelly v. Guinn, supra at 107. **See also Kemp v. Beasley,** 389 F. 2d 178, 190 (8th Cir. 1968); **Booker v. Special School Dist. No. 1, Minneapolis, Minn., supra** at 808-809. **Cf. Cato v. Parham,** 403 F. 2d 12, 15 n. 7 (8th Cir. 1968).

[14] The school district's explanation for faculty segregation was a belief that black "role models" should be assigned to teach black children. This explanation is not sufficient to rebut the presumption for three reasons. First, such a belief is unacceptable as a justification for racially discriminatory practices, since it is contrary to the factual underpinnings of **Brown v. Board of Education,** 347 U. S. 483 (1954). **See Cato v. Parham, supra** at 15 & nn. 6 & 7; **Smith v. Board of Education of Morrilton Sch. Dist.** No. 32, 365 F. 2d 770, 782 (8th Cir. 1966). **Cf. Morgan v. Kerrigan, supra** at 596; **Oliver v. Michigan State Board of Education, supra** at 185.

Second, such a belief—if truly held—reinforces rather than undercuts the presumption of segregative intent with respect to students, since it would logically suggest herding black students into their own schools where they could be taught by their proper black role models. The defendants are thus hoist by their own petard.

Third, the school district's explanation is belied by a 1966 report by the Superintendent. That report declared that the ACLU's request for non-white teachers in all Omaha public schools "is currently unrealistic" but that "[t]he climate of our community has been increasingly receptive." This report suggests that the defendants were "effectuating the discriminatory designs of private individuals." **United States v. City of Black Jack, Missouri,** 508 F. 2d 1179, 1185 n. 3 (8th Cir. 1974), **quoting Dailey v. City of Lawton,** 425 F. 2d 1037, 1039 (10th Cir. 1970). That is clearly unconstitutional state action.

B. STUDENT TRANSFERS

Prior to 1963-64, students in the District could transfer to another school only for reasons of health or hardship. In March of 1964, the school board initiated a new transfer policy. That policy, which continued in effect through the trial,[15] allowed any student to transfer if:

(1) the student's achievement level was at least equal to the average achievement level of the receiving school; (2) the receiving school was not overcrowded; (3) the student's parents provided the transportation; and (4) the request was a formal one.

The District Court found that the evidence concerning the transfer policy was not sufficient to establish an intent to segregate students, and premised that ultimate conclusion on its specific findings that: (1) there was "no evidence" that the achievement level and transportation limitations discriminated against black students;[16]

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[15] Counsel for the defendants stated at oral argument that this transfer policy has been abandoned by the present school board, and has been replaced by a policy permitting transfers of right to minority students when the transfer will result in better racial balance. While commendable, the new policy does not affect the issue of intent underlying prior actions, and is relevant only with respect to the remedy. **See United States v. Board of Sch. Com'rs of Indianapolis, Ind., supra** at 89. Moreover, where, as here, a transfer policy simply gives students the option to choose between identifiably black and white schools, the relief provided is not sufficient. **See Green v. School Board of New Kent County,** 391 U. S. 430, 438-442 (1968).

[16] A report issued by the Mayor's Bi-Racial Subcommittee on Education in 1966 stated that "[t]he 20 elementary schools with lowest mean grade six reading scores * * * enroll the majority of Negro pupils in Omaha." Similarly, in a 1967 letter to the superintendent, Principal Carl Palmquist of Tech High

(2) the transfer policy was used equally by black and white students and the board did not discriminate in granting requests;[17] (3) the segregative effect of the transfer policy on the school district as a whole was slight, since only about 2.5% of all students in the District obtained "segregative transfers" in the years 1970-72;[18]

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noted that the school was 60% black and that "most of our student body [is] performing below grade level in all academic areas."

As for the transportation limitation, the only evidence of record shows that black per capita income was 63% that of whites in Omaha in 1959. No recent data on income was submitted.

[17] In its earlier opinion denying a preliminary injunction, however, the court had noted that it

> * * * appears that some black students were denied access to a majority white school (Lewis and Clark) for the school year 1970-71 for the reason that it was overcrowded, whereas at the same time some white students were allowed to transfer from majority black schools into that school.

United States v. School Dist. of Omaha [Omaha I], 367 F. Supp. 179, 193 (D. Neb. 1973). In its final opinion, the court did not mention this.

[18] The court uses "segregative transfer" to mean those transfers which permit "a student to change to a school in which students of his race are in a percentage at least ten per cent greater than in the school in his zone of residence." **Omaha II, supra** at 312. In 1971-72, 80% of the whites in the District could not possibly have obtained a "segregative transfer," since they already attended schools less than 10% black. Since 2.5% of the total white pool did obtain such transfers, one out of every eight white students who **could** seek a "segregative transfer" obtained one. Moreover, the figures for the predominantly black schools shows that a much higher proportion of the whites assigned to those schools were fleeing by means of the transfer policy. See p. 19, **infra.**

and (4) the effect of the transfer policy on the predominantly black schools was not sufficient to establish segregative intent. As noted in the footnotes, the first three findings are tenuous. We need not directly confront them, however, since we conclude that the fourth finding is clearly erroneous. The evidence presented on transfers granted in 1970-71 and 1971-72 shows that the effect of the transfer policy on the majority and predominantly black schools was profound.

The granting of a transfer request to a white student was virtually automatic. No more than 2% of the white segregative transfer requests were denied in the two school years.

In 1970-71, almost 30% of all white students (318 of 1086) assigned to the twelve predominantly black elementary schools transferred from those schools to predominantly white elementary schools. In 1971-72, this figure was 32% (338 of 1039). The magnitude of the white student flight is further demonstrated by the much smaller figures for black students leaving the same schools: only about 1.5% of the black students transferred out of the twelve predominantly black elementary schools in the same period.

The impact at the junior high level was even greater. In 1970-71, 61% (92 of 150) of the white students zoned to attend the two majority black junior high schools transferred out. In 1971-72, the figure was 71% (154 of 218). During those same years, no more than 7.5% of black students transferred out.

The evidence concerning the one predominantly black high school, Tech, shows a similar pattern. Although only 16% of all white high school students were zoned to attend Tech (90% black) or Central (25% black), over 50% of all transfers granted to white high school students during the two-year period were transfers from this joint attendance zone. Virtually all white South High alone received 250 white students from the Tech/Central zone in 1970-71, and 315 such students in 1971-72.

The foreseeable and actual result of the transfer policy was to increase the segregated nature of almost all of the majority black schools in the District. Accordingly, as was true with the evidence of faculty discrimination, a presumption of segregative intent arose.[19] That presumption was not rebutted.[20]

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[19] Other courts have noted that a transfer policy having segregative effect may be strong evidence of unconstitutional segregation. See **Morgan v. Kerrigan, supra**, at 590; **Booker v. Special School Dist. No. 1, Minneapolis, Minn., supra** at 804, 808; **Spangler v. Pasadena City Board of Education, supra** at 520-521.

[20] The evidence indicated that the officially sanctioned white student flight was not only foreseeable but was known to the defendants in the day-to-day administration of the policy. First, as the District Court found, the school board granted some transfer requests which were explicitly based on racial factors. For example, the following requests for transfers were granted:

> My daughter, Alice, is now going to Clifton Hill School. I would like to request a transfer for her to Fontenelle School for the next school term. She said the reason she wants to transfer is because there are too many Negroe (sic) children in her class * * *
>
> * * * [Request permission to attend Sherman instead of Mann] Because its (sic) a good school and I don't think it right for a girl to go to a considerable Negro school without some of her friends * * *

Compare **Spangler v. Pasadena City Board of Education, supra** at 520.

Second, in 1969, two years before the white student flight shown in the evidence, concern over the obviously segregative effect of the transfer policy had caused Legislative Bill 1042 to be introduced into the Nebraska Legislature. That

C. OPTIONAL ATTENDANCE ZONES

In 1950, the District began a gradual process of converting its elementary schools from Kindergarten through eighth grade (K-8) to Kindergarten through sixth grade (K-6), for the purpose of establishing a junior high system. The seventh and eighth graders released from the elementary schools fed the junior high schools. Although the story is a complicated one, the conversion was achieved in a manner which minimized the necessity of assigning white seventh and eighth graders to the two identifiably black junior high schools: Mann and Tech. Two basic techniques brought about this result:[21] (1) delaying the conversion of predominantly white K-8 schools which would be logical feeders for Mann or Tech; and (2) granting options to the seventh and eighth graders in those schools to attend more distant identifiably

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bill, which died in committee, would have prohibited racially segregative transfers in the Omaha School District. The assistant superintendent in charge of administering the transfer policy, Dr. Hlavac, appeared before a committee of the legislature to testify in opposition to the bill.

Third, despite the capacity limitation in the transfer policy, large numbers of white students were allowed to transfer to South High from the Tech/Central zone at a time when Tech had unused capacity of close to 1,000 and South was seriously overcrowded.

[21] In 1963-64, only fourteen of the original forty-six K-8 schools had not been converted to K-6. Seven of them were not located near Mann or Tech, and they were converted to K-6 in the 1964-65 school year. All or part of their zones were assigned exclusively to one or more nearby junior high schools (not Mann or Tech), and no optional attendance zones were created. The remaining seven K-8 schools were the ones discussed in the text—located so that the nearest junior high was Mann or Tech. All received unique treatment in the conversion process or were not converted.

white junior high schools, when the conversion did take place.

Tech (54% black in 1963-64) was the closest junior high to five predominantly white K-8 schools: Saunders (0% black), Walnut Hill (2% black), Mason (4% black), Jackson (0% black), and Yates (0.3% black). Mann (88% black in 1963-64) was the closest junior high to two other predominantly white K-8 schools: Pershing (0% black) and Sherman (0.2% black).

Saunders, Walnut Hill and Mason were converted to K-6 in the period from 1964-65 to 1967-68. No part of their zones was assigned exclusively to Tech Junior High. Instead, the District created "optional attendance zones," allowing seventh and eighth graders from those schools to choose between attending Tech Junior High—more than 60% black when the options were created—and more distant, identifiably white junior high schools. When the options were created, Tech Junior High had at least 128 vacant seats and, because it was located in the large Tech High School building, which had declining enrollment, additional space could have been made available. The foreseeable and actual impact of the optional zoning policy was irrefutably segregative. In 1971-72, the one year for which data is available on the operation of the options, 111 students chose to attend Lewis and Clark (1.7% black), 53 chose to attend Norris (0.7% black), and 5 chose Tech Junior High (91% black). Had these students, virtually all of whom were white, been assigned directly to Tech, the enrollment of that school would have been 73% black, rather than 91% black in 1971-72.[22]

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[22] In addition, if the 103 white students who obtained transfers out of Tech Junior High in that year had remained at Tech, the percentage of black enrollment would have fallen to 63%. Thus, the difference between a 63% black Tech Junior High and a 91% black Tech was directly attributable to the combination of the two policies of special transfers and optional zoning. Had Jackson been converted to K-6, and its students assigned to Tech, the percentage would have approached 50%.

Conversion of the other two predominantly white K-8 schools near Tech Junior High was further delayed. Jackson elementary continued K-8 throughout the trial, when it was 0.5% black. Yates elementary school, located only five blocks from Tech Junior High, continued K-8 until 1970-71. Even then, the conversion of Yates had been delayed for one year because of parental opposition which Dr. Hlavac, the assistant superintendent, openly attributed to racial prejudice. The conversion of Yates was a pyrrhic victory for integration for two reasons. First, in the summer of 1970, just before Yates seventh and eighth graders were assigned to Tech Junior High, Dr. Hlavac's office approved transfer requests for 30 of the approximately 35 white students in that group, allowing them to attend identifiably white junior high schools. Second, Tech Junior High was closed after the 1971-72 school year. The Yates attendance district was bisected in 1973-74, so that a portion of its seventh and eighth graders was assigned to overwhelmingly black Mann Junior High, and the other portion was assigned to predominantly white Lewis and Clark. No more than 20 new white students were enrolled at Mann as a result of the closing of Tech Junior High.

The two virtually all white K-8 schools located closest to Mann Junior High, Pershing and Sherman, continued as K-8 throughout the trial, despite the conversion policy, available space at Mann, and the fact that neither school had the enrollment or the facilities which the system considered appropriate for a junior high program.

The proof of the foregoing actions by the school board, given the foreseeable segregative impact, raised a presumption of segregative intent.[23] The District Court

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[23] Other cases have found optional attendance zones in fringe communities to be strong evidence of unconstitutional segregation. See **Oliver v. Michigan State Board of Education, supra** at 183-184; **Brinkman v. Gilligan, supra** at 695-696; **United States v. Board of Sch. Com'rs of Indianapolis, Ind.,**

reasoned that any inference of segregative intent—presumptive or otherwise—was rebutted because of two findings: (1) that an optional zone created for a portion of the Druid Hill elementary area had an "integrative effect", thus showing that the defendants acted without reference to racial factors; and (2) that the optional zones were "necessary and reasonable" for Walnut Hill, Mason, and Saunders. For the reasons stated below, we conclude that the presumption was not rebutted.

The Druid Hill option, allowing students in a predominantly black portion of that elementary zone to attend either Mann or McMillan Junior High schools was created in 1967-68. Prior to that time, students in the area had been zoned to attend predominantly white McMillan; the option gave them the opportunity to choose to attend 98% black Mann. Giving students in a predominantly black area a new choice of attending a predominantly black junior high rather than continuing their attendance in a white school does not have an "integrative effect."

The Walnut Hill option gave seventh and eighth graders the option to attend Norris (3.3 miles distant), Lewis and Clark (2.5 miles) or Tech (1.3 miles). The defendants urge that this was "reasonable and necessary" because the junior high to which the Walnut Hill students would ordinarily have been assigned, Monroe, was overcrowded. This is a *non sequitur*. The school board consistently defended its actions throughout trial on the basis of geographical zoning. If the children from Walnut Hill could not be assigned to the most logical school, Monroe, the next most logical school was surely not Norris or Lewis and Clark, but the considerably closer and underutilized Tech. At the very least, the overcrowded

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(Continued from previous page)

supra at 86; **Booker v. Special School Dist. No. 1, Minneapolis, Minn., supra** at 804; **Spangler v. Pasadena City Board of Education, supra** at 508 n. 8; **Hobson v. Hansen,** 269 F. Supp. 401, 415-417, 499-501 (D. D. C. 1967), **aff'd as construed,** 408 F. 2d 175 (D. C. Cir. 1969).

nature of Monroe does not provide a reason for the defendants' decision to assign *no part* of the Walnut Hill attendance area exclusively to Tech.

The Saunders option gave seventh and eighth graders the option to attend Tech (1 mile), Norris (2.2 miles) or Lewis and Clark (2.5 miles) in 1964-65. The District Court found this "reasonable and necessary" because "enrollments at Technical Junior High were up and enrollments at Lewis and Clark were down." *Omaha II, supra* at 307. The record is to the contrary. It shows that, in 1964-65, Lewis and Clark was operating with 88 students less than stated capacity and Tech was down 142 students from stated capacity. The 25 to 30 seventh and eighth graders from Saunders could easily have been absorbed at the much nearer Tech Junior High.[24]

In sum, we conclude that the reasons advanced by the school district to justify the adoption of optional attendance zones for seventh and eighth graders in the predominantly white elementary zones on the border of the black community are not sufficient to rebut the presumption of segregative intent.[25]

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[24] We accept the District Court's conclusion that Mason seventh and eighth graders had to be given an option to attend Tech, Norris or Bancroft, because of commercial areas and extensive interstate highway construction between the students and Tech. We conclude, however, that this is not sufficient, standing alone, to establish that segregative intent was not among the factors that motivated the school board's actions.

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[25] Indeed, we find the elaborate system of delayed conversion, optional zones, and the closing of Tech Junior High to be inexplicable unless in furtherance of a single coherent policy: the unwillingness to assign white students to schools perceived as black, the "neighborhood school" or any other policies notwithstanding. See **Morgan v. Kerrigan, supra** at 588. Cf. note 28, **infra.**

D. SCHOOL CONSTRUCTION

The District Court found that, from 1951-73, thirty-nine new schools or additions were constructed, of which thirty-seven opened either predominantly black or white, and that all twenty-one buildings or additions constructed from 1964 through 1973 opened either predominantly white or black. More specifically, between 1951 and 1973, nineteen schools opened 100% white, fourteen more opened 98% white, and two more opened 93% or more white. At the same time, two new structures opened 94% or more black, one opened 82% black, and one opened 71% black. Only one school in the twenty-two year span opened as truly integrated; that was Indian Hill elementary school, with 28% black enrollment, and that school is located in an area of the city which is entirely separate from the major black community in the "Near North Side."

A specific example of the racial impact of the building policies was the construction of Martin Luther King Middle School. Clifton Hill seventh graders (predominantly black) had traditionally attended majority white Monroe Junior High. After King was constructed, they were reassigned to that school, which opened 82% black. Leaders in the black community protested against this segregative impact and appellants sought a preliminary injunction in this action to restrain the building of King. In its order denying the preliminary injunction, the District Court noted:

> * * * The evidence supports the view that apparently some white students live closer to King than do blacks, yet those white are allowed to go to a predominantly white school while requiring blacks who live farther from King, to attend that institution.

Omaha I, supra at 185.[26]

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[26] The District Court did not deal with this earlier finding or, for that matter, with the construction of King school in its final opinion.

On the basis of the foregoing record, the evidence was sufficient to establish a presumption of segregative intent.[27] Nothing in the record served to rebut that presumption.[28]

E. THE DETERIORATION OF TECH HIGH SCHOOL

In 1973-74, Tech High had an enrollment which was 96% black. Because it shared a common attendance zone

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[27] In other school segregation actions, more limited showings have warranted relief. See, e. g., **Milliken v. Bradley, supra** at 1080-1081; **Morgan v. Kerrigan, supra** at 587; **United States v. Board of School Com'rs of Indianapolis, Ind., supra** at 87-88; **Davis v. School District of City of Pontiac, Inc., supra** at 576. **See also Swann v. Charlotte-Mecklenburg Board of Education, supra** at 21, recognizing that "the existence of a pattern of school construction and abandonment is * * * a factor of great weight."

[28] The defendants argue that their construction decisions are explained by adherence to a neighborhood school policy. However, the school district had no such consistent policy with respect to the black schools in Omaha and the schools on the fringe of the black community. Time and again, the policy—if one existed—was discarded whenever it would have had an integrative effect: the defendants riddled it with exceptions, including a virtually automatic transfer policy, optional attendance zones in fringe communities, a shared attendance zone precluding anyone from being compelled to attend the only black high school (Tech), and geographically suspect assignment practices for predominantly black King Middle Schools. It is an understatement to say, as the Supreme Court found in **Keyes v. School District No. 1, supra** at 212, that "the 'neighborhood school' concept has not been maintained free of manipulation." See **also Oliver v. Michigan State Board of Education, supra** at 184-185; **Morgan v. Kerrigan, supra** at 584 n. 7, 588; **Dowell v. School Board of Oklahoma,** 244 F. Supp. 971, 977 (W.D. Okla. 1965), **aff'd,** 375 F. 2d 158 (10th Cir.), **cert. denied,** 387 U. S. 931 (1967).

with Central—the only joint attendance zone in the District—no student had to attend Tech High. Only 710 students chose to enroll in that year, despite its capacity of 2,475. It was the black high school in Omaha.

Tech High is located in a white neighborhood, close to the southern boundary of the black community. It opened in 1923 as a vocational and college prep school. From 1936-45, it had the largest student body in the District, with a peak of 3,771, and it was predominantly white. Starting in 1950, the black enrollment at the school increased markedly, from 17% in 1950 to 51% in 1963 to 96% in 1973. Simultaneously, it experienced a steady decline in total enrollment. The District Court found that, during this period, Tech developed a large unused capacity at the same time as South and Benson were seriously overcrowded.[29] The school board's solution to overcrowding in adjacent predominantly white high schools was to construct additions at Benson, North and South in the late 1950's and early 1960's, and to build Bryan, Burke and Northwest High schools. Boundary adjustments were necessary when the three new schools opened, just as they would have been if space at Tech had been used.

Whatever the initial reasons for the adoption of the joint Central/Tech attendance zone, there was evidence that Tech's continued status as a school which no one had to attend was at least in part due to perceived white community opposition to a compulsory attendance zone which would force them to send their children to a black

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[29] For example, in 1961-62, Tech [44% black] was 938 under capacity, while enrollment at Benson [0% black] was 155 over capacity. In 1963-64, the year Tech turned majority black, Tech was 682 under capacity, while Benson [0.1% black] was 607 students over capacity. And, in 1970-71, Tech [88% black] was 1,502 under capacity, and Benson [3.3% black] was 599 over capacity. **Compare Morgan v. Kerrigan, supra** at 586.

Tech High.[30] The result of the joint attendance zone was that, in 1973-74, only twenty-two white students attended Tech, despite the fact that all of the white high school students in the District could have chosen to attend Tech under the "open school" policy, and despite the fact that the Tech/Central zone encompassed all or part of twelve identifiably white elementary attendance areas.

As the enrollment at Tech declined, and the proportion of black students increased, certain course offerings were dropped, and extracurricular activities were curtailed. In particular, electronics was dropped from the curriculum, and its instructor was transferred to predominantly white Benson, which was located in an adjacent attendance area and was overcrowded. At the same time, courses which the school board felt would be more adequately suited to the needs of Tech's increasingly black enrollment, including culinary arts and auto body shop, were added to the curriculum. Simultaneously, Tech began to serve growing numbers of "special education" students. The criteria used by the defendants to place such students in Tech was an IQ below 85, "emotional problems", and difficulty in learning. Many of these students were disruptive and presented disciplinary problems. At a minimum, of 1,170 students enrolled at Tech in 1970-71, 244 students (21%)

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[30] Dr. Fullerton, Assistant Superintendent for Instructional Services, testified that the Committee for the Future of Technical High School, of which he was a member, considered the possibility in 1973 of establishing a compulsory attendance zone for Tech, but was concerned with

> * * * a number of factors which will influence attitudes and create animosities, would create reluctance, [and] would tend to * * * create a poor atmosphere in the school community for pupils to learn and teachers to teach.

Asked if he was referring in part to racial prejudice, Dr. Fullerton replied, "Yes."

were special education students. Only two other high schools had such students in that year: North with 4% and South with 2%. By 1973, the Committee for the Future of Technical High School reported in one of its memoranda: "The consensus was that we now are [a school for special education] except in name."

By 1971-72, Tech High was in a state of disrepair, was ungovernable, and was 91% black. After protests of various kinds, the District repaired and renovated it, changed faculty assignments, and altered the curriculum to offer more individualized instruction. Despite the attempt to shore it up, the preferred recommendation of the Committee for the Future of Technical High School in 1973 was: "Close the school—disperse the students."

The District Court found that the steady decline in enrollment, the constant and severe overcrowding at neighboring schools, and the increasingly black makeup of Tech were known to the administration of the Omaha public schools. The court further found that

> * * * Mr. Carl Palmquist, the principal at Technical during the 1950's and 1960's, repeatedly notified the Superintendent of Schools and his staff orally and in writing that Technical was in danger of becoming an all-black school.

Omaha II, supra at 308.

Nevertheless, the court found that the increasingly segregated nature of Tech High school was not evidence of segregative intent because the defendants showed "a determination * * * to upgrade both the physical plant and the quality of education at this school." *Id.*

Assuming the validity of the court's factual finding that the District sought throughout the 1960's and 1970's to provide an excellent education at Technical,[31] the court's conclusion that no segregative intent was shown by the board's actions with respect to Tech High school was premised, at least in part, on the doctrine of "separate but equal" educational facilities. This has not been the law since *Brown v. Board of Education* and "[t]he law can never afford to bend in this direction again." *Haney v. County Board of Education of Sevier County, Ark., supra* at 926.

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[31] The "upgrading" to which the court referred did not take place until it had become clear to all concerned that Tech High was destined to become a virtually all black school. The

By focusing on the quality of education at Tech High, the District Court gave insufficient weight to the fact that the defendants' actions in setting up a joint Tech/Central zone, in making Tech a special education school "except in name", in deleting attractive vocational courses such as electronics from the curriculum and substituting courses aimed at meeting black stereotypes,[32] in permitting Tech's enrollment to dip far below capacity, and in assigning most of the black high school teachers to Tech, all combined to result in a high school which was identified as "a 'colored school' just as certainly as if the words were printed across its entrance in six-inch letters." *Kelley v. Altheimer, Arkansas Public School Dist. No. 22,* 378 F. 2d 483, 491 (8th Cir. 1967), *quoting*

(Continued from previous page)

attrition of white students had already been completed, and no amount of physical renovation and curriculum changes would likely bring them back to a school which they did not have to attend. Moreover, the preferred recommendation of the Committee for the Future of Technical High School to close the school does not square with the court's conclusion that "the potential for an excellent vocational educational program at Technical has [not] in any way diminished." **Omaha II, supra at 310.**

[32] We do not mean to criticize the addition of courses which were geared to the needs of the students. However, the deletion of other courses which would have been attractive to whites as well as blacks removed one of the last few incentives for a white student to choose to attend Tech High.

Brown v. County School Board of Frederick County, Va., 245 F. Supp. 549, 560 (W. D. Va. 1965). The result of the defendants' actions in these instances, given the assignment of students to Tech by choice, was not just natural, probable and foreseeable, it was inevitable: a virtually all black and relatively empty school. That result is even more significant when it is recalled that Tech is located in a white neighborhood.

The presumption of segregative intent which arose following proof of the above course of conduct was not rebutted by anything in the record.

IV. REMEDY

It follows from the foregoing findings that racial discrimination in the Omaha public schools must be eliminated root and branch. We, therefore, remand to the District Court with instructions to it to take those steps necessary to bring about a thoroughly integrated school system in accordance with the guidelines and the timetable set forth below. We recognize that integration will be difficult. The pain of transition is an unfortunate, but inevitable result of deliberate policies which have isolated black Americans from the schools and residential communities[33] of white Americans. Fortunately, the present board of education has indicated a disposition to move toward an integrated school system.[34] We are confident that, when it understands fully the additional steps that need to be taken to achieve integration, it will take those steps.

A. FACULTY INTEGRATION

The faculty shall be fully integrated by the opening of the 1975-76 school year. A ratio of white to black faculty members shall be established in accordance with the principles set forth in ***Swann v. Charlotte-Mecklenburg Board of Education, supra*** **at 19-20, and** ***United States v. Montgomery County Board of Education, supra.***

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[33] **See pp. 5-7, supra.**

[34] **See note 15, supra.**

B. STUDENT INTEGRATION

It shall be the responsibility of the board of education to develop a comprehensive plan for integrating the student body. In formulating the plan, the board shall work with the school administration, the state department of education, the parties to this lawsuit, and an interracial committee to be named by the District Court. The burdens of integration shall be borne as equally as possible by blacks and whites in all geographic areas of the District. Because substantial changes in student assignments will be required, and because some schools were damaged by a recent tornado, the planning and implementation of student integration may be done in phases, so long as the ultimate deadline is achieved. Plans for the first phase shall be submitted to the District Court for approval within forty-five days of the issuance of this Court's mandate. The first phase shall be put into operation for the beginning of the 1975-76 school year. A comprehensive plan for completing the process of integration shall be presented to the District Court no later than January 1, 1976. The District shall be thoroughly integrated no later than the beginning of the 1976-77 school year.

The plan for integrating the student body shall be developed and implemented in compliance with the following guidelines:

(1) The reassignment of students currently attending integrated schools shall be avoided wherever possible. This policy recognizes the desirability of integrated schools in integrated neighborhoods. *See Swann v. Charlotte-Mecklenburg Board of Education, supra* at 28. It makes little sense to reassign students now attending integrated schools in their neighborhood to schools in other sections of the city. For this purpose, schools with black

enrollments between 5% and 35% are to be considered integrated.[35]

(2) In schools where the black enrollment is presently below 25%, such enrollment shall not be increased above the 25% level by operation of the plan. This policy will discourage the labeling of additional schools as "black," will hopefully discourage "white flight," and will further integration in the District.

(3) The ratio of black to white students at schools which presently have a black enrollment between 25% and 35% shall not be significantly increased by operation of the plan, and in any event, the outer limit shall be set at a level not to exceed 35% black enrollment.

(4) The attendance policies at schools where black enrollment exceeds 35% shall be altered so that black enrollment at such schools drops to a level not to exceed 35%. *See Booker v. Special School Dist. No. 1, Minneapolis, Minn., supra* at 808. *Cf.* note 3, *supra.*

The integration techniques to be used by the school board in meeting the above guidelines shall consist of those which have been approved by the Supreme Court, including the pairing or clustering of schools, the realignment of school assignment zones, and the relocation of portable classrooms. To the extent that transportation is required to achieve an integrated school system, it shall be paid for by the school district.[36]

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[35] As we read the record, in 1973-74, the following elementary schools were integrated under this standard: Belvedere, Central Grade, Field Club, Fontenelle, Highland, Lord, Minne Lusa, Mount View, Rosehill, Walnut Hill, Wakonda, and Yates. Integrated junior high schools included Hale, Indian Hill, and Lewis and Clark. Integrated high schools included Central and Benson.

[36] It is apparent from the record that assignment of students on a strict neighborhood or geographical basis will not be sufficient to eliminate the segregation which has been found to

No transfers shall be permitted which will have the effect of increasing the segregated nature of either the sending or receiving schools. *See Booker v. Special School Dist. No. 1, Minneapolis, Minn., supra* at 811; *United States v. Board of Education, Independent School District No. 1, Tulsa County, Okl.,* 429 F. 2d 1253, 1260 (10th Cir. 1970). A transfer policy, whereby any student may transfer as of right from a school where his race is in the majority to a school where his race is in the minority, *see* note 15, *supra,* may be included in the plan, with the provision that the school district shall provide the necessary transportation costs.

It shall be the responsibility of the School District to assure that "future school construction and abandonment are not used and do not serve to perpetuate or re-establish the dual system." *Swann v. Charlotte-Mecklenburg Board of Education, supra* at 21. Accordingly, any construction of new schools or additions to old schools other than that contemplated in the plan, shall be submitted to the District Court for approval. *See Booker v. Special School Dist. No. 1, Minneapolis, Minn., supra* at 811.

The District Court shall retain jurisdiction to assure that the plan is one which effectively integrates the entire Omaha school system, and to assure that the plan is in fact being carried out. To assist the court in its monitoring function, the court's order should include reporting provisions, requiring that reports on the operation of the plan be filed periodically with the court for a period of at least three years. *See Cisneros v. Corpus Christi Independent School District,* 467 F. 2d 142, 153 n. 10 (5th Cir. 1972) (en banc), *cert. denied,* 413 U. S. 920 (1973); *Booker v. Special School Dist. No. 1, Minneapolis, Minn., supra* at 811.

It is necessary that school officials should come forward promptly with an acceptable plan for the district court's consideration. The district court is required to remedy the discrimination under an acceptable plan in accordance with the guidelines set forth in this opinion.

Reversed and remanded for further proceedings consistent with this opinion. The mandate of this Court shall issue forthwith.

Costs shall be taxed against the School District of Omaha.

(Continued from previous page)

exist, at least with respect to some schools. The Supreme Court has made clear in unanimous opinions that "[t]he measure of any desegregation plan is its effectiveness." Davis v. Board of School Commissioners of Mobile County, 402 U. S. 33, 37 (1971); Swann v. Charlotte-Mecklenburg Board of Education, supra at 25. To the extent that geographic zoning assignment will not succeed in dismantling the dual system and eliminating all vestiges of state-imposed segregation, the school board is not permitted to rely on that technique. See Newburg Area Council, Inc. v. Board of Education, Jefferson County, Ky., 489 F. 2d 925, 931 (6th Cir. 1973), cert. denied, 43 U. S. L. W. 3571 (1975). See also United States v. Board of Education, Independent School District No. 1, Tulsa County, Okla. 429 F. 2d 1253, 1258-1259 (10th Cir. 1970). As the Supreme Court has stated,

> * * * [a]ll things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes. But all things are not equal in a system that has been deliberately constructed and maintained to enforce racial segregation * * *
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> * * * "Racially neutral" assignment plans proposed by school authorities to a district court may be inadequate * * * [w]hen school authorities present a district court with a "loaded game board" * * * Swann v. Charlotte-Mecklenburg Board of Education, supra at 28. Hence as a practical matter, in Omaha as well as in other large metropolitan areas, "[d]esegregation plans cannot be limited to the walk-in school." Id. at 30.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

JUDGMENT

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(Filed June 15, 1975)

No. 74-1964 September Term, 1974

United States of America,

Appellant,

and

Nellie Mae Webb, et al.,

Intervenors,

vs.

The School District of Omaha, State of Nebraska, et al.,

Appellees.

No. 74-1993

United States of America,

and

Nellie Mae Webb, Henry Webb, David Webb, and Kasey Webb; Zenola Hilliard and Kenneth Hilliard; Lorraine Patterson, Pamela Patterson and Deborah Patterson; Charlotte Shropshire, Michael Shropshire, Metoya Lynn Shropshire and Dan Lee Shropshire; Irene Gunter, William Gunter, Reginal Gunter, Rushton Gunter, Brian Gunter and Randall Gunter; Lerlean Johnson, Angela Johnson, Kevin Johnson, Irene Johnson, Jesse Johnson, Jr., Charlotte Johnson and Sarah Johnson; Lillie Gunter,

Kenneth Gunter, Linda Gunter, Patricia Gunter and James Gunter,

Appellants,

vs.

The School District of Omaha, State of Nebraska; Owen A. Knutzen, Superintendent of Schools; Joseph M. Hart, Jr., President of the Board of Education; Dr. Paul C. Kennedy, Vice President of the Board of Education; John C. Barnhart, Dorothy C. Beavers, D. Michael Blankenship, Mrs. Maurice J. Frank, Leo A. Hoffman, Rev. R. F. Jenkins, Richard J. O'Brien, Jr., Charles A. Peters, Tim J. Rouse, and Frank E. Stanek, Members of the Board of Education of the School District of Omaha, State of Nebraska.

Appellees.

Appeals from the United States District Court for the District of Nebraska.

These causes came on to be heard on the record from the United States District Court for the District of Nebraska and were argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in these causes be and the same is hereby reversed.

And it is further ordered by this Court that these causes be and are hereby remanded to the said District Court for further proceedings consistent with the opinion of this Court.

The mandate of this Court shall issue forthwith.

June 12, 1975

A True Copy.

Attest:

/s/ Robert C. Tucker

Clerk, U. S. Court of Appeals, 8th Circuit. June 12, 1975

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

74-1964 September Term, 1974

UNITED STATES OF AMERICA,
Appellant,
and
NELLIE MAE WEBB, et al.,
Intervenors,
vs.
THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,
Appellees.

74-1993
UNITED STATES OF AMERICA, et al.,
Appellants,
vs.
THE SCHOOL DISTRICT OF OMAHA, ETC., et al.,
Appellees.

Appeals from the United States District Court
for the District of Nebraska

The petition for rehearing en banc in the above entitled matter is denied. The opinion of the Court is modified on page 36 by inserting in subparagraph (4) after the words "not to exceed 35%." the following footnote which shall be numbered 35.5:

[35.5] The District Court may permit the following two deviations from this guideline, if it finds after hearing that the deviations will not aggravate white flight or make it more difficult to achieve a fully integrated school system: (1) Those schools with current black enrollment exceeding 50% may be permitted to lower the black proportion of their enrollment to 50% rather than 35%; and (2) Those schools with current black enrollment between

35% and 50% may be permitted to continue with their current enrollment ratios, rather than requiring them to lower the black enrollment to 35%. We reemphasize that in no event shall the percentage of black enrollment be permitted to be increased by operation of the plan in any school where black enrollment currently exceeds 25%.

July 7, 1975

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

74-1964 September Term, 1974

UNITED STATES OF AMERICA,
Appellant,
and
NELLIE MAE WEBB, et al.,
Intervenors,
vs.
THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,
Appellees.

No. 74-1993
UNITED STATES OF AMERICA, et al.,
Appellants,
vs.
THE SCHOOL DISTRICT OF OMAHA, ETC., et al.,
Appellees.

Appeals from the United States District Court
for the District of Nebraska

On Consideration of Appellees' motion to recall and stay mandate in these causes, it is now here ordered and adjudged by this Court that Appellees' motion be and is hereby denied.

July 18, 1975

AMENDED JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

74-1964, 74-1993 September Term, 1974

UNITED STATES OF AMERICA and
NELLIE MAE WEBB, et al.,

Appellants,

vs.

THE SCHOOL DISTRICT OF OMAHA,
STATE OF NEBRASKA, et al.,

Appellees.

Appeals from the United States District Court
for the District of Nebraska

Upon the Court's own motion, that portion of the Court's judgment which requires implementation of a plan for integrating the student body in the School District of Omaha is stayed until August 22, 1975. The remainder of the judgment, including the requirement that the faculty be integrated by the opening of the 1975-1976 school year and the requirement that a plan for integrating the student body be prepared by the school board working in conjunction with the school administration, the state department of education, the parties to the lawsuit, and an interracial committee to be named by the District Court, shall remain in effect in accordance with the terms of the Court's opinion of June 12, 1975.

July 24, 1975